IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROY LANGBORD, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al., Defendants.	:	CIVIL ACTION
UNITED STATES OF AMERICA, Third-Party Plaintiff, v. TEN 1933 DOUBLE EAGLE GOLD PIECES, Third-Party Defendant-in-rem.	:	No. 06-5315

Legrome D. Davis, J. July 5, 2011

MEMORANDUM OPINION

I. BACKGROUND

In that the Court writes for the parties, who are well aware of the basic facts underlying the dispute, it need not again set out the full tale here, but rather incorporates the factual background found in previously issued memorandum opinions. (See Docs. No. 96, 108 & 131.) Suffice it to recount only this: In July 2009, the Court ordered that the Government initiate forfeiture proceedings against ten 1933 Double Eagles (the "Double Eagles," "Coins," or "Gold Pieces") that the Langbords had turned over to the Government so that they could be authenticated. (Doc. No. 108.) Two months later the United States sought leave to file a multi-count complaint (Doc. No. 111), which included the court-ordered forfeiture count against

the Double Eagles.[1] Forfeiture is warranted, the Government argues, because the Double Eagles were embezzled or stolen from the United States Mint, and wrongfully retained by someone with knowledge that they were embezzled or stolen. See 18 U.S.C. § 641. On the eve of the forfeiture trial, the United States and Langbords challenge the admissibility of various evidence offered by the other side. This opinions resolves those evidentiary disputes to the extent they can be resolved prior to trial.

II. DISCUSSION

To better explain its evidentiary rulings and provide further guidance to the parties, the Court sets forth here the law and analysis underlying its decisions. The Opinion proceeds in logical steps: We first discuss the threshold question of authenticity, an area of some concern given the age and state of many proposed exhibits. It then moves on to determine which of the proposed exhibits are relevant, and weighs the probative value of the relevant documents against their potential prejudicial effect. Next, the Opinion tackles the hearsay questions raised by the parties, followed by a brief discussion of expert testimony. Finally, although the Court does not resolve the majority of jury-instruction issues in this Opinion, it does explain its ruling on the Langbords' motion for instructions related to the unconstitutional seizure of the Coins by the United States.

A. Authenticity

Federal Rule of Evidence 901 makes the "authentication or identification [a proposed

[1]The portion of the United States's complaint that survived the Langbords' Motion to Dismiss includes a declaratory judgment count, wherein the United States seeks a declaration that the Coins are government property. The Court will resolve issues related to the declaratory judgment count in a separate order.

exhibit] . . . a condition precedent to admissibility" and deems the requirement "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Importantly, the proponent need not conclusively prove that a piece of evidence is authentic; "[a]ll that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be." McQueeney v. Wilmington Trust Co., 779 F.2d 916, 928 (3d Cir. 1985) (internal quotation marks omitted). Thus, though authenticity is a condition precedent to admissibility, "[t]he burden of proof for authentication is slight." Id.

1. Ancient Documents

The majority of events giving rise to the United States's forfeiture claim occurred between 1933 and 1947. As such, the United States urges the Court to deem the large majority of its documentary evidence authentic under the Federal Rule of Evidence 901(b)(8), commonly known as the ancient document rule. The rule provides that a proponent meets its slight burden of proof so long as a document "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered." Fed. R. Evid. 901(b)(8).

Under this rule, the United States seeks to introduce certified copies of documents it obtained from the United States Mint, the National Archives and Records Administration ("National Archives"), the Federal Reserve Bank of New York, the American Numismatic Society Library, Connecticut State Library, the Federal Bureau of Prisons, and the United States Department of the Treasury Library. (See Doc. 148.) The Langbords do not challenge the documents' age or that they were recovered from places where authentic documents would likely

be. Rather, the Langbords contend that, with respect to many of the documents, the United States has not met its threshold burden of establishing that the documents' condition casts no suspicion on their authenticity.

The primary basis for the Langbords' objection is that the documents are neither signed by their authors nor, if letters, paired with signed letters to indicate they were ever sent or received. These fact, they contend, renders each of the unsigned documents too suspicious to qualify as prima facie authentic on its own, and must be accompanied by some extrinsic evidence in order to be deemed authentic as an ancient document.

The Court agrees that the available Third Circuit precedent suggests that importance of extrinsic evidence under certain circumstances, but finds sufficient evidence in the Government's proposed exhibits to conclude that the majority of the unsigned documents meet the authenticity threshold. Unlike more typical ancient documents, these documents, though unsigned, have been kept in the custody of the federal government, the State of Connecticut, or the American Numismatic Society library. The Langbords have cast no doubt on the ability of these institutions to keep records; nor have they "put forward so much as a hint that these documents have been tampered with in any way."[2] Parsons v. Celotex Corporation, C.A. No. CV 478–319, slip op. at 3 (S.D. Ga. Aug. 27, 1980) (quoted approvingly in Threadgill, 928 F.2d at 1376). Although a lone unsigned letter found by a layperson in a decedent's desk drawer might require

[2]That the National Archives does not possess a complete set of correspondence sent to the Philadelphia mint from 1914 through 1956 does not cast sufficient doubt upon the records that the National Archives does, in fact, possess. As the Langbords themselves acknowledge, the National Archives record-keeping responsibilities were clarified in 1950. One could reasonably conclude that any incompleteness of records created before or near that time logically follows from unclear record-keeping regulations, rather than suggest that the National Archives lacked (or lacks) the ability to retain the documents it received during that period.

some further extrinsic proof of authenticity, documents stored by governmental agencies with other documents of the same kind, discussing the same subject matter, and lacking any hint of suspicion qualify as prima facie authentic.

The Langbords' argument that many ancient documents in this case were prepared in anticipation of related criminal and civil forfeiture proceedings does not require a different conclusion.[3] While some courts have expressed that the ancient document rule makes sense because "such evidence is less likely to be affected by the forces generated by the litigation since they are made in a context where there is less reason to fear a lack of candor, distortion, whether conscious or unconscious, or even deliberate falsehood affected the statements made," Compton v. Davis Oil Co., 607 F. Supp. 1221, 1229 (D. Wyo. 1985), a broad policy underlying the rule need not apply to every document that meets the rule's delineated criteria. "Although the rule requires that the document be free of suspicion, that suspicion does not go to the content of the document but rather to whether the document is what it purports to be . . . ." United States v. Kairys, 782 F.2d 1374, 1379 (7th Cir. 1986) (cited approvingly in Threadgill, 928 F.2d at 1376). Whether the document's contents are trustworthy, accurate, or complete does not bear upon authenticity, but "upon the weight to be accorded the evidence." Kairys, 782 F.2d at 1379. Requiring courts to ignore the ancient document rule's three requirements and make determinations based on whether a document was prepared with similar litigation in mind would require courts to assess a document's trustworthiness or bias, a task inappropriate when resolving

[3]Indeed, to the extend that the challenged documents are United States Secret Service reports, "there is an assumption that public officials perform their duties properly, and without motive or interest than to submit accurate and fair reports." United States v. Versaint, 849 F.2d 827, 831-2 (3d Cir. 1988); See also Clark v. Clabaugh, 20 F.3d 1290, 124 (3d Cir. 1994).

threshold authenticity questions.

But though the majority of the documents meet all three requirements of the ancient document rule, a hint of uncertainty does appear in a few of the Government's proposed exhibits. Perhaps because of the documents' age, many of the records seem to have been "copied" manually. The Langbords complain especially of two manually transcribed potential copies of a 1933 telegram (United States's Proposed Exhs. 134 & 266) and an alleged copy of a statement that the Government attributes to Israel Switt, but which does not bear his signature (United States's Proposed Ex. 239). In addition, the many unsigned documents bearing the word "COPY" or marked as signed either with type-written letters or a stamped image bear similar indicia of uncertainty.[4] As the Third Circuit has explained, "the point of a Rule 901(b)(8) inquiry is to determine whether the documents in question are, in fact, what they appear to be." Threadgill v. Armstrong World Industries, Inc., 928 F.2d 1366, 1376 (3d Cir. 1991). Thus, when an indication that the document has been recreated manually appears on the face of the document, the Langbords challenge that the United States has not put forth any evidence to establish that these documents are what the Government asserts they appear to be: accurate reproductions of missing originals.

In order to attribute the contents of these unsigned manual copies to their supposed authors—e.g., demonstrate that a manually reproduced document should be treated as if it were

[4]The Court has identified these proposed exhibits as falling within one of the aforementioned problematic categories: 117, 119 (page 1) , 127 (letter marked "COPY"), 133–37, 188, 198, 200, 202, 221 (enclosures only), 233 (Charles P. Rump's unsigned statement), 233A, 237 (last page), 238 (last page), 240 (except March 21, 1944 letter from Helen C. Moore, a signed version of which appears at 123), 266 (attachments marked "COPY", except March 21, 1944 letter from Helen C. Moore), 274 (attachments stamped "signed by"), 285 (attachment), 305–307.

the 1933 telegram itself—the Government must establish that the copies are accurate reproductions of originals. In all but a few instances (where, for example, a signed copy also appears among the proposed exhibits), they have not produced sufficient extrinsic evidence to overcome the marks of uncertainty that appear on the documents' faces, and thus they have not established prima facie authenticity of the documents as accurate copies of originals. But the marks suggesting that the documents were manually created does not prevent the United States from introducing them; they just must do so under slightly different terms. Although the United States has not provided sufficient evidence to suggest that the manual copies accurately reflect originals—and are, therefore, the originals' equivalents—they have established that these documents were manually created more than 20 years ago and now comprise part of archival government files related to the 1933 Double Eagle. Defined in this way, the documents qualify as prima facie authentic. Whether the contents of the documents are accurate—that is, whether they actually reflect now missing originals such that the contents can be attributed to the document's supposed author—is a separate question that the parties may contest before the jury.

2. Government's Challenges to Langbords' Proposed Exhibits' Authenticity

The Government challenges the authenticity of the majority of the Langbords' proposed exhibits on the grounds that the Langbords have not provide proof of authenticity. The Langbords respond that they have provided the Government with record custodian certificates for 52 of those exhibits. To the extent that the certificates appear authentic at trial, the Court will deem the documents prima facie authentic under Rule 902(11) (business record must be "accompanied by a written declaration of its custodian"). (See Langbord Proposed Exs. 8, 10–23, 25–29, 31–44, and 46–63.) Eight more of the proposed exhibits appear to be self-

authenticating official publications or periodicals covered by Rule 902(5) and (6). (See Langbord Proposed Exs. 2, 3, 64–67, and 150.) The three photographs taken by the Langbords' counsel's paralegal might properly be authenticated through her testimony under Rule 901(b)(1). (See Langbord Proposed Exs. 45, 68, 69.) If the Government will not stipulate to the authenticity of those documents the Langbords state they received from the Government, the Langbords can either obtain the appropriate certifications or limit their use to cross-examination purposes as they suggest.

B. Relevance and Prejudice

This section of the Court's Memorandum Opinion explains its evidentiary rulings premised upon Federal Rules of Evidence 401, 402, 403, and 404. Rule 402 provides that "[a]ll relevant evidence is admissible"; Rule 401 defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." A piece of relevant evidence might be deemed inadmissible nonetheless if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. Finally, Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but that evidence of bad acts offered for any other purpose that also meets Rule 403's balancing test can be admitted. In conducting this Rule 404(b) analysis, the court "must balance the actual need for that evidence in view of the contested issues and other evidence available to the [proponent]." United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996); United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988) (same). With these rules in

mind, the Court addresses the categories of proposed exhibits to which the Langbords raised an objection, followed by the categories to which the Government raised an objection.

1. Barnard Decision

Contained within the United States's proposed exhibits are documents related to United States v. L. G. Barnard, a 1947 case in the Western District of Tennessee. There, the United States sought replevy of one 1933 Double Eagle from collector L. G. Barnard. Judge Boyd made factual findings that the Philadelphia Mint had "not receive[d] a license from the Secretary of the Treasury" to issue any 1933 Double Eagles, that "[t]he weight of the bullion resulting from the melting of all 1933 Double Eagles held by the Philadelphia Mint was the same as the weight of the coin prior thereto," and therefore that the 1933 Double Eagle at issue "was taken from the Philadelphia Mint illegally, upon substitution of a Double Eagle of another year, so that its loss would not be detected in weighing." (Gov't Proposed Ex. 1-A at 2-3.)

The Langbords object to the introduction of Judge Boyd's factual findings and legal opinion on the grounds that no exception to the hearsay rule provides for the introduction of judicial opinions or factual findings.[5] (Doc. No. 153 at 28.) The Government responds that these documents are not, in fact, hearsay because it does not intend to introduce them for the truth of the matter; the Government instead asserts "they are set forth to show that Israel Switt, and any other purchaser or holder of 1933 Double Eagles subsequent to the Barnard decision,

[5]The Langbords' broad objection also seems to include Government's Proposed Exhibits 119 and 127. As for Proposed Exhibit 119, the Court determines that the first page, which references the Barnard case, is inadmissible because, as a non-public document, it does not provide Israel Switt or his family notice of anything. All other documents that make up Proposed Exhibit 119 are admissible as they do not refer to the Barnard case and meet the remaining requirements for admissibility, as this Memorandum Opinion explains. For the reasons explained below, the Court deems Proposed Exhibit 127 presently inadmissible.

was on notice that the government alleged the property was stolen." (Doc. No. 162, at 21-22.) The Langbords label this strategy a ruse because the Government fails to provide any evidence that Switt knew about the Barnard decision—in fact, the Langbords claim, the case's publicity was limited to a brief July 1947 New York Times article appearing on page 23 with more than myriad short news stories and obituaries and a 1948 Numismatist paragraph-long story on page 50. Thus, the argument goes, "there is no evidence, and no reasonable basis for a jury to conclude, that Israel Switt or his heirs—all of whom were living in Philadelphia when the articles were published—actually saw either of these minor stories," and the Government should not be allowed to introduce the Barnard decision for the purposes of proving notice.

If the Government seeks to introduce the Barnard findings of fact and judicial opinion for their truth, the Court finds no hearsay issue with the documents—like many of the United States's proposed exhibits, the documents were created more than 20 years ago, are in conditions that create no suspicion concerning their authenticity, and were found in the National Archives collection in Georgia, qualifying them as an ancient document under Rule 901(b)(8) and therefore as a "statements in ancient documents" for hearsay purposes pursuant to Rule 803(16).

But this conclusion does not end the admissibility inquiry. Rule 403 requires courts to balance the probative value of a particular piece of relevant evidence against any undue prejudice that the evidence might spark and to exclude the evidence if the undue prejudice substantially outweighs the probative value. Fed. R. Evid. 403. Judicial findings of fact or conclusions of law pose a serious risk to the fairness of the judicial process because "they would likely be given undue weight by the jury" and "creat[e] a serious danger of unfair prejudice." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F. Supp. 1125, 1186 (E.D. Pa. 1980). Beyond

that, introducing legal conclusions made sixty-four years ago by a judge who considered different evidence might muddle the issues in the present case and require a forceful instruction about the relationship, or lack thereof, between that case and this one. See id. Because the United States seems to possess nearly all of the evidence that Judge Boyd considered in 1947 and those documents are admissible as ancient documents, the absence of necessity for this evidence tips the closely balanced scale against its admission as stand-alone substantive evidence.

Turning back to the United States's proposed resolution—to admit the Barnard opinion and factual findings for notice purposes only—the Court concludes that, despite the lack of direct evidence that Switt or his relatives ever learned of the Barnard decision, the decision's existence has a tendency to make Switt's or his relatives' notice of the potential illegality of possessing 1933 Double Eagles at least somewhat more probable, such that the Barnard documents meets Rule 401's relevancy threshold. A plethora of proposed admissible evidence demonstrates the extent of Switt's dealing in gold coins and his questioning by the Secret Service about 1933 Double Eagles. A fair inference may be drawn that, although an average Philadelphian may not have received notice of the Barnard decision, Switt, with as much to gain or lose from it as anyone, would have been made aware of it through one channel or another.

That said, based on the Rule 403 analysis performed above, introducing the Barnard factual findings and opinion for purposes other than to demonstrate notice, or extensively recounting the factual or legal conclusions that Judge Boyd drew, would subject the Langbords to undue prejudice.

Finally, the Court is mindful that David Tripp and Eric Rauchway, the United States's experts, relied upon these documents for their truth, and not their notice potential. Rule 703

governs the disclosure of evidence relied upon by experts and prohibits experts from discussing otherwise inadmissible evidence unless the Court "determines that [the evidence's] probative value in assisting the jury to evaluate the expert's opinion substantially outweighs [its] prejudicial effect." Here, the Barnard opinion and factual findings are historical accounts that Tripp and Rauchway used, along with other historical documents and accounts, to reach the conclusion that the 1933 Double Eagles were stolen. The factual findings and legal conclusion are of the type of historical evidence which experts typically rely upon in reaching expert opinions. Because the weight of the historical evidence supporting the conclusion that the Coins were stolen, balanced against the dearth suggesting the Coins left the Mint through authorized channels, undergirds both expert opinions, Tripp and Rauchway may refer to the documents during their testimony, and they will be admitted as exhibits. They may not, however, stress that in a legal action similar to the instant dispute, a judge made a determination favorable to the government upon consideration of substantially similar evidence. The Court will give the jury a cautionary instruction to ensure that the jury does not place undue weight on Judge Boyd's legal opinion and counsel is requested to promptly submit a proposed instruction on this point.

2. 1934 Switt Gold Hoarding Case

The United States seeks admission of documents related to a second case: United States v. 98 Twenty Dollar United States Gold Coins lately in the possession of Israel W. Switt (hereinafter "Switt case"), wherein the Government sought and obtained forfeiture of coins seized from Switt's person in 1934 because, in possessing them, he violated the Gold Reserve

Act of 1934.[6] The Langbords claim that the Switt case documents are irrelevant, highly prejudicial, and laden with hearsay. The Court addresses the hearsay argument later in this Order but here concludes that the documents appropriately go to Switt's knowledge of the repercussions from breaking the gold laws and provide evidence of a motive to conceal his possession of the ten 1933 Double Eagles presently at issue.

Because the proposed evidence centers on Switt's prior bad acts, the Court must assess "first, whether the evidence is logically relevant, under Rules 404(b) and Rule 402, to any issue other than the defendant's propensity to commit the crime; and second, whether under Rule 403 the probative value of the evidence outweighs its prejudicial effect." United States v. Himelwright, 42 F.3d 777, 781 (3d Cir. 1994) (citing United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992). Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 404(b) is a rule of inclusion, rather than exclusion. United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988). Although the Third Circuit has expressed concern that the motive for

---

[6]In this 1937 action, the district court ordered the forfeiture of $2,000 in gold coin consisting of 98 (pre-1933) Double Eagles and four Single Eagles (ten dollar gold pieces). In his factual findings, Judge Maris wrote:

> The gold coins in question were seized by agents of the Government from Switt's person as he was about to board a train from Philadelphia to Baltimore where he planned to meet a dealer in old gold coin with whom he had previously done business. He had taken the gold from his safe deposit box in Philadelphia and it was his intention to put it in a box in Baltimore or return it to Philadelphia. He stated he planned ultimately to turn the gold in to the Treasury. . . . Switt admitted that he knew of his duty to deliver up these gold coins.

(Gov't Proposed Ex. 168.)

introducing such evidence often comprises both "an urge to show some other consequential fact as well as to impugn [a person's] character," United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir.1994) (internal quotation marks omitted), when the proponent of bad acts evidence "clearly articulate[s] how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged," he or she has proffered evidence that tends to prove a fact besides character. Himelwright, 42 F.3d at 781. That does not end the inquiry, however. Once the proponent articulates a permissible purpose under Rule 404(b), the court must weigh the probative value of the evidence against its potential to cause undue prejudice under Rule 403. Jemal, 26 F.3d at 1272.

The Government contends that Switt case the documents show "Switt was on notice that the government would seize stashes of gold coins and forfeit them for his failing to have turned them in" and that he had a "motive in later concealing the ten 1933 Double Eagles at issue in this case." (Doc. No. 162, at 19, 20.) Both of these reasons are persuasive. The Switt case stems from Switt's breach of the Gold Reserve Act of 1934 and concerns the possession of ninety-eight Double Eagles, while this case centers on the alleged violation of 18 U.S.C. § 641 and concerns the possession of ten Double Eagles. But, in both instances, application of the separate laws relate to the concealment of high-value Double Eagles. The Switt case documents, particularly Switt's statement to Agent McDevitt and Switt's testimony before the court, provide potential evidence of knowledge, motive and intent and would fairly support an inference that Switt was aware of the laws related to the possession of gold coins and that possession of gold coinage, particularly Double Eagles, was unlawful under certain circumstances. The documents have a proper evidentiary purpose since they speak directly to motive, knowledge, intent and the

absence of mistake or accident.

The Switt case documents also raise an additional permissible inference related to additional potential § 641 violations. As discussed above, they are relevant and probative of Israel Switt's, and perhaps his wife's, mental state and potential motive to conceal the 1933 Double Eagles from 1937 until his death in 1990 and her death in 1985. Moreover, as discussed below, the Government seeks to tender several pieces of evidence that might reasonably be viewed as suggesting that Joan Langbord had knowledge of the Gold Pieces during and after the probate process and concealed that knowledge until after the sale of the Fenton coin. That her father had been convicted previously for a crime arising from the possession of pre-1933 Double Eagles, if testimony concerning related circumstances is sufficiently suspicious, also potentially supports this an inference of knowledge and concealment. After all, documents indicate that upon his arrest in 1937 Switt told law enforcement officials that he had retrieved the ninety-eight Double Eagles from his safe deposit box in Philadelphia (Gov't Ex. 168), possession of which eventually passed to Joan Langbord.

As a permissible purpose for the Switt documents' introduction plainly exists, the Court must weigh their probative value as to motive and knowledge against the danger of unfair prejudice. The fact that so many of the facts giving rise to this forfeiture action occurred between 1933 and 1947 heighten these documents' probative value. The Government has incredibly limited access to individuals who might have spoken with Switt about his knowledge of whether it was legal to possess the 1933 Double Eagles, or his potential motives for concealing his possession of them. After all, the majority of Switt's contemporaries are long since deceased. Only the claimant Langbords, with interests obviously very divergent from the Government's,

will offer testimony about their relative. As a result, any documentary evidence that tends to prove a fact central to a 18 U.S.C. § 641 violation is highly probative. Although the Court certainly understands that some level of prejudice will arise from the introduction of the Switt case documents, this prejudice is not unfair. It is clearly understood that the evidence, while relevant and germane, is admissible only for a limited purpose. We fully intend to caution the jury that they may not consider the evidence for the purposes of determining Switt's character or whether he possessed a propensity for criminality and solicit counsel's input in the formulation of an appropriate instruction.

3. Documents Regarding the Decision Not to Prosecute Switt

The Langbords seek to exclude two proposed exhibits that explain why the United States did not prosecute Israel Switt, despite the evidence they amassed suggesting that he was likely involved in the theft of the 1933 Double Eagles from the Mint in one way or another. Government Proposed Exhibit 279, a December 18, 1944 letter from Agent Fred Gruber of the Secret Service to the U.S. Attorney, summarizes the Secret Service's findings; Government Proposed Exhibit 276, which contains a February 6, 1945 letter in response, explains that the statute of limitations barred Switt's prosecution. According to the Langbords, "[t]here is no probative value in a decision *not to prosecute* Mr. Switt, . . . nor is there any probative value to the fact that the Secret Service sought such a prosecution." (Doc. No. 154-1, at 21.) The United States responds that the documents should be admitted because, after hearing testimony and seeing documentary evidence regarding the case against Switt, the jury will want to know the conclusion to the story. Indeed, a jury might fairly conclude that the absence of a prosecution is evidence of the limited value of the evidence accumulated by the Secret Service. As all

experienced advocates well understand, the failure to answer a logical and natural question, as well as the failure to explain why certain investigative actions were not taken, is frequently paramount in a jury's determinations. The Government's presentation of its reasons for deciding not to prosecute Switt are indeed relevant and germane. As it is essential in providing a full contextual understanding of historical events, the United States is permitted to present evidence that a prior United States Attorney decided not to prosecute Switt for statute of limitations reasons after receiving documents explaining Switt's likely involvement in the 1933 Double Eagle theft.[7]

4. Other 1933 Double Eagles Seized in the 1940s and 1950s

The Secret Service undertook considerable efforts to determine how the nine 1933 Double Eagles circulating in the 1940s and 1950s were released from the Mint. They made detailed reports recounting the facts they gathered during their investigation—including a widely accepted conclusion that George McCann was the likely thief—and their attempts to reacquire the coins. The Langbords argue that the fate of these other coins and the Government's threat of prosecution that prompted other collectors to surrender the coins "is not probative of how the Langbords' Coins left the Mint, is unduly prejudicial, and will be confusing to the jury." The Court disagrees.

As to relevance, the number of 1933 Double Eagles in the market and the information gathered by the Secret Service about their provenance support the inference of theft in the

[7]The Court is mindful that a letter from the U.S. Attorney might, in some circumstances, qualify as a legal opinion. The implication apparent from the letter, however, is not couched as a legal opinion, but as a strategic or discretionary choice. Thus, its inclusion does not run afoul of the principle that neither lay nor expert witnesses can testify to a legal conclusion. See infra Section II.B.7.

following ways: (1) the investigators concluded that all of the 1933 Double Eagles of which they were aware entered circulation in 1937, just before the time at which they were to be melted into bullion, suggesting a single theft rather than random authorized release; (2) the investigators concluded that all of the 1933 Double Eagles spread from a single source—Israel Switt—an unlikely occurrence if the Coins were accidentally or haphazardly released from the Mint; (3) that Switt had at one point possessed all of the 1933 Double Eagles in circulation, which the Secret Service concluded were stolen, suggests that the ten Gold Pieces subject to forfeiture in this case were also stolen; and (4) some of the Government's proposed exhibits relating to other 1933 Double Eagles demonstrate that Switt had knowledge of the fates of these circulating coins, the United States's contention that the coins were illegal to possess, and the United States's successful reacquisition of all the coins of which the Government was aware, giving rise to both motive and knowledge inferences.

Even if the documents are probative, the Langbords contend, they are unduly prejudicial and will confuse the jury. Again, the Court disagrees. Though the four relevant inferences raised above may reduce the Langbords' chance of success in this matter, such prejudice is not undue. And the jury will not easily confuse the Secret Service's conclusions regarding theft of nine coins that the Government reacquired more than a half century ago with the determinations they must make regarding whether the ten 1933 Double Eagles in this case were stolen, or possessed with knowledge that they were stolen, from the Mint. To the extent that, through the documents, the Secret Service expresses an opinion about the legality of possessing the coins, the Court can alleviate any potential confusion or the risk that the jury will give that determination undue weight with a curative instruction. Again, we welcome a proposed instruction.

5. Documents Regarding Other Thefts from the Mint

The Government proposes several exhibits related to thefts from the Mint that occurred prior to 1937, some of which attribute the theft to George McCann, the head cashier. The Langbords cry foul, claiming that previous thefts are irrelevant and that any evidence regarding McCann goes to his propensity to commit further theft, not to any legitimate inference. This evidence of prior theft fits into one or both of these categories: it is either (1) evidence that prior thefts occurred; and/or (2) evidence that McCann committed the thefts.

The first type of documents is plainly relevant and not unduly prejudicial. Whether a past theft occurred certainly tends to show that another theft might have occurred, taking advantage of the same security weaknesses, for example.[8] The risk of a jury confusing the theft of 1928 gold coins with the 1933 Double Eagles in this case is minimal, and can certainly be clarified by counsel during the trial. The second type, exposing McCann's involvement in the theft, requires an analysis under Rule 404(b). Although the evidence does relate to McCann's character, it also tends to show that McCann had an opportunity to steal the 1933 Double Eagles based on his work at the Mint and that if he participated in the removal of the Double Eagles from the Mint, it was not the result of a mistake or accident on his part. Both of these are legitimate purposes under Rule 404(b), and the documents' probative value on these two points far outweighs the risk of any prejudice that the Langbords' might experience. Moreover, upon request, the Court will caution the jury not to evaluate the bad acts evidence introduced for its tendency to show

[8]As for the documents that refer to Charles P. Rump, to the extent that any insinuation exists that Rump could have been involved in the theft of the Gold Pieces that the Langbords possessed prior to 2004, those documents are relevant for opportunity and lack of mistake or accident, much like the documents referring to McCann. If no one contends that Rump was involved in the alleged theft of the Gold Coins, the documents are not offered for propensity.

propensity to commit additional bad acts.

6. Probate and Safe Deposit Box Exhibits

The Langbords also contend that exhibits related to the probate of Elizabeth and Israel Switt's estates and the safe deposit box in which Joan Langbord claims to have discovered the 1933 Double Eagles are "wholly irrelevant to central question[s] to be decided," and substantially more prejudicial than probative. (Doc. No. 153 at 25–28.) According to the Government (and seemingly undisputed by the Langbords), the probate documents demonstrate that the executors of neither Elizabeth nor Israel Switt's estates declared the Coins or the safe deposit box in which the Coins were discovered for probate or tax purposes. The Government argues that the probate documents are highly relevant to the issue of knowing and unlawful concealment, an element of the crime underlying the forfeiture count. See 18 U.S.C. § 641; § 981(a)(1)(C). The Langbords counter that neither Joan, nor David, nor Roy, but rather Stanton Langbord, a son and a sibling who is not a party in this action, bore responsibility for ensuring that the Coins' existence was documented when those estates went through probate, such that the documents do not bear on whether the parties in this action knew of or concealed the Double Eagles.

As an initial matter, only in rare instances is direct evidence available to establish a person's state of mind. Proof of knowledge or intent is typically inferred from conduct and attendant circumstances. The evidence that the Government intends to introduce regarding the safe deposit box closely bears on the probate documents' potential relevance. According to the United States, Joan Langbord, leased the safe deposit box in 1996, six years after her father Israel, and eleven years after her mother Elizabeth, had died. (See Gov't Proposed Ex. 318.) Adding to the inference of knowing concealment, the Government points out that although state

law requires a representative of the Commonwealth or bank to be present when opening a safe deposit box owned, or co-owned, by a decedent, none of the exhibits proposed by either side reveal that Joan Langbord complied with this requirement when she inventoried the box and claims she discovered the Coins. These additional pieces of information cast the probate documents in a slightly different light and make their relevance as to concealment clear: If Joan herself leased the safe deposit box and she frequently accessed the safe box once she leased it,[9] a fair inference can be made that she knew of the Double Eagles and concealed them from the Government because she knew them to be illegal to possess. If the box indeed contained items of which the Langbord Claimants were unaware, one could infer that one of the Switts concealed the Coins from their family members, a set of facts supporting the inference of knowing and intentional concealment as well as the absence of accident or mistake. Depending upon the presentation of the evidence at trial, it might also be fairly inferred that the Langbord Claimants themselves gained knowledge of the Double Eagles and then concealed the Coins from the Government, also suggesting that the Langbords knew the coins were illegal to possess. Introducing the evidence for these reasons is permissible under Rule 404(b), and although evidence of potential wrongdoing may prejudice the Langbords, the prejudice is not undue—indeed, the potential wrongdoing tends to establish intentional concealment and knowledge that the Gold Pieces were stolen and speaks directly to two elements of the criminal charge underlying the forfeiture count.

7. Legal Opinions by Treasury Department in the 1940s

[9]Indeed, she accessed the box containing the Gold Pieces on July 29, 2002, the day before the Fenton coin was sold at auction. (Govt Proposed Ex. 318.)

The Langbords contest the admission of three additional documents prepared by Treasury Department attorneys regarding the United States's effort to repossess 1933 Double Eagles in the 1940s. Dated May 4, 1944, a memorandum from Treasury Department General Counsel Joseph J. O'Connell, Jr. explains the possible legal mechanisms by which the United States could reacquire the nine known 1933 Double Eagles in circulation at that time. (Gov't Proposed Ex. 228). The second document, written by Mr. O'Connell on April 28, 1945 to Secret Service Chief Frank Wilson, explains that private citizens in possession of these coins could be prosecuted for receiving stolen property (one of the many suggestions in the previous memo). (Gov't Proposed Ex. 275). The final document to which the Langbords object on these grounds is a January 5, 1946 memo from Treasury Department Assistant General Counsel Norman O. Tietjens to the Justice Department that outlines the expected testimony and evidence in the Barnard trial. (Gov't Proposed Ex. 127.) According to the Langbords, these documents present legal conclusions in a way that usurps the function of the Court to instruct the jury on the law.

Generally, neither an expert witness nor a lay person may give testimony that amounts to a legal conclusion. Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195, 217 (3d Cir. 2006); Hogan v. American Telephone & Telegraph, 812 F.2d 409, 411–12 (8th Cir. 1987) (lay opinion is not helpful if couched as legal conclusion); Christiansen v. National Savings and Trust Co., 683 F.2d 520, 529 (D.C. Cir.1982) ("lay legal conclusions are inadmissible in evidence"). But the Government does not seek to introduce these exhibits in order to improperly influence the jury. Rather, it contends that the documents are admissible if the Langbords contend, as they have in the past, that United States has held inconsistent positions regarding whether the 1933 Double Eagles in circulation were lawfully released.

Should the Langbords call into question the United States's legal stance regarding the status of the 1933 Double Eagles, the Court will permit the introduction of Government Proposed Exhibits 228 and 275. These two documents express broad opinions about the state of the law without analyzing the specific evidence that the Government may present to the jury in this case. As such, neither document contains an "ultimate legal opinion" or is calculated to improperly sway the jury. See United States v. Newman, 49 F.3d 1, 7 n.8 (1st Cir. 1995). A limiting instruction, therefore, can sufficiently mitigate against any risk that the jury will give undue weight to the lawyer's opinion. See Bensen v. American Ultramar Ltd., No. 92-4420, 1996 WL 422262, at *12–13 (S.D.N.Y. July 29, 1996) (mentioning danger that when "the opinions are framed by lawyers, . . . a jury may see [the lawyers] as experts instructing them on the law."). If the Government arrives at the view that the presentation of evidence at trial has made these documents relevant, it should advise the Court outside of the presence of the jury and obtain a ruling in advance of presenting the documents or posing document-related questions.

Proposed Exhibit 127, on the other hand, includes reference to specific evidence that the Government also seeks to introduce in this case, without significantly buttressing to the United States's assertion that it has held a consistent position as to the legality of possessing a 1933 Double Eagle from 1933 onward. A less senior Treasury Department official wrote Proposed Exhibit 127 and did so *between* the dates when the more senior official wrote Proposed Exhibits 228 and 275. In other words, its marginal relevance and cumulative nature lessen its probative value; but its specificity and greater overlap with the facts of this case amplify the extent to which it may confuse or usurp the functions of the jury. Accordingly, the Court concludes that the document is presently inadmissible.

8. Providing Context Regarding Current Controversy

The United States moves to limit the introduction of the background information that the Langbords' perceive as necessary to fairly convey to the jury how the Coins came to be in the United States's possession. The Langbords wish to introduce evidence that they "came forward seeking to discuss some kind of agreement, that the Coins were made available and transferred to the government for the purposes of authentication and without the Langbords giving up any rights, and that, having authenticated the Coins many months later, Mint counsel advised the Langbords that the government would retain the Coins." (Doc. No. 161 at 6.) According to the Langbords, this information is "critical" so that "the jury has an accurate and contextual understanding of the circumstances surrounding the transfer of possession of the Coins," "to rebut any arguments that the Langbords were improperly withholding the Coins," and "to ensure that the jury does not misunderstand or give any weight to the fact that the Coins are currently in the government's possession." (Doc. No. 161, at 6.) The United States counters that the Langbords "reservation of rights" and the Mint's decision to retain the coins have "no bearing on this case," which turns on whether the Coins were stolen or embezzled from the Mint. (Doc. No. 152 at 14.) But perhaps because it acknowledges that the jury needs some background, the United States's list of facts that it intends to prove that the Langbords simply "surrendered" the Gold Pieces in September 2004. (Doc. No. 151-15, at ¶241.)

In order to ensure that the jury has a basic understanding of the facts giving rise to this case, the Court concludes that the Langbords may briefly introduce evidence regarding their turning over the Double Eagles to the Mint and the Mint's decision not to return them. But their submissions shall be limited, providing only basic contextual information and shall not include

any reference to the possessory or ownership interest they claim to have had prior to turning over the Gold Pieces (although they may discuss possession, they may not draw any legal conclusions from it).

Nor may the Claimants make any reference to this Court's conclusion that the United States violated the Langbords' procedural rights, as this legal determination does not provide *useful* background information or bear upon whether the Coins were stolen or embezzled from the Mint. The Court can think of no purpose for introducing evidence concerning this Court's determination of the Mint's improper actions to a jury empaneled before this Court other than to unduly prejudice the United States. And the supposed presumption of ownership from undisturbed possession, which the Langbords incorrectly attribute to the Court, confuses the issue. Notably, the Court held only that the Langbords' continuous possession gave rise to a possessory interest that conferred upon them a set of due process rights, not any presumption of rightful ownership. (Compare the Court's Opinion, Doc. No. 108, at 19; with the Langbords' mischaracterization of it, Doc. No. 153-1, at 26.)[10] Moreover, unless and until the Langbords concede forfeitability but contest forfeiture on the grounds that they are innocent owners, their possessory interest in the Gold Pieces as of 2004 bears no relevance to whether the United States has established that the Coins are the proceeds of illegal activity and are therefore subject to forfeiture.

9. Small Denomination Coin Letters

The United States also seeks an order excluding letters written by the Mint in 1933 and

[10]This holding was central to the resolution of the summary judgment motion and the failure of the sophisticated litigants before this Court to appreciate the fundamental nature of this ruling is difficult to comprehend.

1934 regarding its tracking of small denomination coins. Nine of the twelve exhibits refer to 1913 nickels, for which the Mint changed the stamp design in 1913 but could not aid in the procurement of one design or the other because the nickels were not segregated by design. (Langbord Proposed Exs. 27, 34, 36–39, 41, 43 & 55.) One exhibit refers to 1922 one-cent pieces and indicates that the pennies were not segregated by year. (Langbord Proposed Ex. 44.) Another refers to 1934 half dollars and reports that "we have no definite program covering the coinage of half dollars during the calendar year." (Langbord Proposed Ex. 45.) The final letter does not specify a particular coin, but broadly states that "the Government does not keep coins segregated by years." (Langbord Proposed Ex. 56.) The Langbords wish to introduce this evidence to buttress Roger Burdette's expert opinion that "the Mint did not attribute special importance to the date on a coin." (Burdette Report at 10 & n.17.) The Government argues that the documents are irrelevant because they refer to coins of appreciably lesser value and do not refer to gold coins, let alone Double Eagles from a particular year.

To assess the relevance of these documents, the Court turns to Rule 401, which instructs that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Although the Court finds little probative value in letters regarding small denomination coins minted 20 years before the ten 1933 Double Eagles that the Government seeks to forfeit, Rule 401's low threshold supports their admission. The United States contends that this limited probative value is outweighed by the "unreasonable danger of confusing the issues or misleading the jury." (Doc. No. 152 at 16.) The Court disagrees: the differences between pennies, nickels, half dollars and $20 gold pieces, and the

span of years between the dates that the small denomination coins were minted and 1933 are not difficult to comprehend or accentuate during examination. Accordingly, the Court concludes that, even under Rule 403's balancing test, the Langbords' proposed exhibits regarding how the Mint tracked its coin production are admissible. Whether the practice applied to 1933 Double Eagles and the weight to be accorded the evidence are matters for the jury.

10. 2007 Mint Website Printout

Next, the Government contends that the Langbords should not be permitted to introduce a page printed from the Mint's website in 2007 that lists the 1933 Double Eagle among "Circulating Coins." The Langbords assert that the Government's "admission" weakens the Government's argument that the Mint never lawfully issued 1933 Double Eagles, and is therefore relevant under Rule 401. According to the United States, the hyperlink associated with this information linked to a story about the "Fenton coin," which, in fact, was monetized in 2002 as part of a settlement agreement resulting from litigation similar to the instant case. (Doc. No. 151, at 17 n.1.) In response, the Langbords provide a series of additional screenshots showing that the hyperlinked page in turn hyperlinked to four pictures, none of which were of the Fenton coin. (Doc. No. 161, at 9 n.5.) No matter what the Mint meant when it advertised the 1933 Double Eagle as circulating, it did not limit its description to a specific coin monetized in 2002, and the statement potentially qualifies as an admission such that the hearsay rule does not bar its admission pursuant to Rule 801(d)(2)(A). See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 648 F. Supp. 2d 805, 806 n.2 (E.D. La. 2009) (finding printout from defendants' website the "admissible as a party-opponent's own statement"); TIP Sys., LLC v. SBC Operations, Inc., 536 F. Supp. 2d 745, 756 n.5 (S.D. Tex. 2008) (same); Perfect 10, Inc. v.

Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002) (same).

11. Post-1933 Gold Laws and Regulations

The Government also challenges the Langbords' proposed exhibits related to post-1933 laws and regulations regarding the possession of gold coins, arguing that they lack relevance to the regulations in effect. The Langbords respond that they only intend to introduce those exhibits to rebut any insinuation by the United States that it is illegal to possess 1933 Double Eagles, even if they were released through authorized Mint channels. In the Court's view, the Government has not yet attempted such an assertion, but if it does, and only then, will this Court resolve the admissibility of Proposed Exhibits 66 and 75. If the Claimants believe the Exhibits have become relevant, they are directed to raise their intention to pose questions in this area to the Court outside the hearing of the jury. At that time, the parties should be prepared to address the central question of whether the evidence to date in this action establishes that 1933 Double Eagles were monetized such that they may fairly be termed "coins," an issue central to whether Exhibits 66 and 75 apply to the Gold Pieces at issue here.

12. Completeness of Government Records

The Langbords present three proposed exhibits that they contend tend to show the incompleteness of government records. Proposed Exhibits 64 and 65 are printouts from the National Archives website, and Proposed Exhibit 45 is two photographs of a correspondence log from which several pages have been removed. The United States object to this evidence on the ground that it is "presumably Claimants' backdoor way" of arguing that the records are incomplete and that the Langbords have not listed any witnesses capable of testifying about these documents. Regarding the United States's seeming contention that the documents are irrelevant

or prejudicial, the Court concludes otherwise. All three documents make it slightly more probable that the records the Government relies upon are not complete, thereby bolstering the Langbords' contention that such records could not lead to a conclusive opinion as to whether the Gold Pieces left the Mint through authorized channels. As for the United States's argument that no witnesses will be available to testify about these documents, the Court leaves their presentation up to the Langbords, but finds both website printouts prima facie authentic under Rule 902(5), which provides that "publications purporting to be issued by public authority" are self-authenticating, and non-hearsay under Rule 801(d)(2)(D), which provides that a statement is not hearsay if offered against a party "by his agent or servant concerning a matter within the scope of his agency or employment, (and is) made during the existence of the relationship."[11]

13. Treasury Room Drawing and Picture

Next, the United States objects to the Langbord Proposed Exhibits 138 and 139, which the Langbords have identified as a photograph and drawing of the "Treasury Cash Room." The Langbords claim that these documents are admissible under Rule 703 because their expert, Roger Burette, relied upon them to bolster his opinion that the ten 1933 Double Eagles could have left the Mint through means other than theft. According to Burdette, these documents show that the cash room, in which individuals could purchase new coins in-person, was open to the public and

[11]Because the United States represents the interest of the people in this action, the Court considers any agency of the Executive Branch an agent of the United States under Rule 801(d)(2)(D). See United States v. American Tel. & Tel. Co., 461 F.Supp. 1314, 1333–34 (D.D.C. 1978) (United States was plaintiff in civil antitrust suit, not Department of Justice, where United States was listed plaintiff and such suits were typically instituted by United States rather than a particular branch of government); c.f. United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989) (where relevant and competent section of the government charged with conduct related to case was department charged with the development of rules for highway safety, that department's statements qualify as admissions).

that Treasury employees had access to the coins kept there. Because these exhibits will aid the jury in understanding what value to assign to Burdette's opinion, the Court finds them admissible under Rule 703. As Langbords point out, though the images depict the room as it was in 1975,[12] Mr. Burdette plans to testify that the layout is substantially similar to the 1933 layout, with which he is familiar. The Government is, of course, permitted to argue that the jury should assign them a lesser weight based on the date discrepancy, but it does not make the exhibits inadmissible.

14. Miscellaneous Government Objections

Finally, the Government argues that the Langbords cannot introduce their Proposed Exhibits 95 and 97, the 1947 Regulations for the Transaction of Business at the Mints, Assay Office, and the Bullion Depositories of the United States, and a description of coin redemption procedures at the Mint during the 1930s, respectively. The Government's objection to Proposed Exhibit 97 lacks merit. As the Langbords point out, the Government proposes to introduce the same document as an attachment to a memorandum from William Dowling to Frank Burke, numbered Gov't Proposed Exhibit 296. Without the memorandum cover-page proposed by the Government, the document the Langbords seek to introduce has unclear relevance; but once the document is contextualized, the Government would be hard pressed to articulate why its own proposed exhibit lacks relevance. The Government's objection to the introduction of the Langbord Proposed Exhibit 95, however, is persuasive. Because the regulations set forth in Proposed Exhibit 95 became effective on December 1, 1947, the Langbords' contention that the

[12]The Government objects to the photograph's and drawing's introduction on the grounds that the documents bear no date. (Doc. No. 152, at 25.) The Langbords clarify that the dates for the photograph and drawing are available at the website shown on the bottom of Proposed Exhibit 138.

1947 version of the regulation is as likely to be accurate as the 1918 version contained in the Government's proposed exhibits holds no water. Despite the fact that 1933 falls closer to 1947 than 1918, the 1918 regulations were effective in 1933, unless superceded by another set of regulations before 1933, while the 1947 regulations would not become effective for fourteen more years. Accordingly, the Court concludes that the Langbord Proposed Exhibit 95 does not bear upon the issues presented in this case and is not admissible as direct evidence or for the purposes of cross-examining Government expert David Tripp, unless Mr. Tripp suggests that the 1918 regulations remained in effect past 1947, or something similar.

C. Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R .Evid. 801(c). Rule 801 prohibits the admission of an out-of-court statement offered to prove the truth of the matter asserted because

> the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined.

United States v. Pelullo, 964 F.2d 193, 203 (3d Cir. 1992). There are two ways to overcome a potential hearsay problem: First, the proponent can rely on the statement nor for the truth of the matter asserted, but for another purpose. Second, there exist many exceptions to the hearsay rule which deem particular pieces of evidence sufficiently reliable to come into the record for their truth, despite their out-of-court nature.

1. Ancient Document Hearsay Exception

Whether a particular piece of evidence crosses the authenticity threshold by virtue of the ancient document rule has a significant impact on a related inquiry: whether the out-of-court statements therein are admissible, despite being hearsay. Federal Rule of Evidence 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Rule 803, in turn, sets out a number of exceptions to this rule, including that "[s]tatements in ancient documents." Fed. R. Evid. 803(16). Courts and scholars agree that this exception renders admissible statements made by the document's author about which the author had personal knowledge. Rule 805, however, adds a slight twist by providing that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"—that is, a hearsay exception must exist to cover each level of hearsay contained within a document.

The interplay between Rules 803(16) and 805 gives rise to a debate between scholars, courts, and here, between the United States and the Langbords. "One position is that a separate hearsay exception must apply to each layer of hearsay contained within the ancient document to warrant admission of the specific statement into evidence." Hicks v. Charles Pfizer & Co. Inc., 466 F. Supp. 2d 799, 806 (E.D. Tex. 2005) (citing United States v. Bronislaw Hajda, 135 F.3d 439, 444 (7th Cir. 1998) ("[I]f the [ancient] document contains more than one level of hearsay, an appropriate exception must be found for each level"); Columbia First Bank, FSB v. United States, 58 Fed. Cl. 333, 338 (Fed. Cl. 2003) ("Rule 805 would be superfluous" if all levels of hearsay were admitted under Rule 806(13))); see also United States v. Stelmokas, No. 92-3440, 1995 WL 464264, at *6 (E.D. Pa. Aug. 2,1995). Other courts have admitted multiple levels of

hearsay within ancient documents under Rule 803(16). See Murray v. Sevier, 50 F. Supp. 2d 1257, 1264 n.6 (M.D. Ala. 1999) (interviewee's statements reported in a newspaper article admissible under Rule 803(16)), vacated on other grounds by Murray v. Scott, 253 F.3d 1308 (11th Cir. 2001); Gonzales v. North Twp. of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992) ("As the newspaper articles in Exhibit C are well more than twenty-years old, the statements contained within are admissible into evidence . . . ."), rev'd on other grounds, 4 F.3d 1412 (7th Cir. 1993)); Ammons v. Dade City, 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984) (admitting newspaper articles to prove the existence of a street paving program in 1925 without inquiry into the double hearsay issue); see also John W. Strong et al., McCormick on Evidence § 323 (5th ed. 2003) ("The more common tendency appears to be to admit newspaper articles over 20 years old without the proper inquiry.").

The Court need not choose sides in a vacuum. Following the Eastern District of Texas's 2005 decision in Hicks, Professor Michael H. Graham, in supplementing Wright & Miller's Federal Practice and Procedure, drew this conclusion:

> Hicks is incorrect. The text, underlying purpose, and rationale of Rule 803(16) each supports a broad interpretation. Rule 80[3](16) simply says, "statements in a document," not "statements in a document made on personal knowledge of the documents creator." Thus, a newspaper article over twenty years old reporting any event is admissible even if the article states that information was received from third parties, i.e., the context of the article is not solely within the personal knowledge of the creator or creators of the document. Realistically, any requirement that the proponent of the ancient document must establish the personal knowledge of the creator of the document as to all matters contained therein would effectively emasculate Rule 803(16)'s utility as it did in Hicks. Hicks is thus incorrect both as a textual matter and a matter of policy and should not be followed.

Wright & Miller's Federal Prac. & Proc. § 7057, Rule 803(6): Statements in Ancient Documents

(2010). The Court finds fault in Professor Graham's conclusion that Hick's requires all ancient documents' authors to have personal knowledge of the facts they record; as the Langbords note, hearsay within an ancient document would be admissible if any one of the many hearsay exceptions applied. But Graham's reasoning is nonetheless persuasive. The ancient document hearsay exception recognizes the difficulty in finding witnesses that made statements more than 20 years prior, and that even an imperfect but relatively contemporaneous recollection by the document's author of the second-party statement would likely be more accurate than a 20-year-old memory. Moreover, although not always the case (as is true with every rule application), the second-party is as unlikely as the ancient document's author to have spoken with an eye toward litigation 20 years in the future, a consistently cited rationale for the existence of the ancient document rule. The arguments made in favor of requiring a different hearsay exception for all but the document itself—primarily focused on the danger of reading Rule 805's multiple-hearsay rule out of existence—miss the mark. Rule 803(16) provides a broad hearsay exception that applies to any level of hearsay within an ancient document. That is, even following Rule 805's mandate that a court examine each level of hearsay independently, Rule 803(16) supplies the grounds by which each level within an ancient document becomes admissible. Accordingly, the Court rejects the Langbords' contention that any but the first level of hearsay within an ancient document requires its own hearsay exception. The Government need only authenticate a document under Rule 901(b)(8) in order for the statements therein to be admissible to prove the truth of the matter asserted.[13]

[13]The Langbords also argue that some of the Government's proposed exhibits—namely various Mint legers and process records—are not admissible as ancient documents because no direct evidence exists to prove that the declarants had personal knowledge of the information

2. Government's Hearsay Objections

The Government contends that two of the exhibits that the Langbords intend to introduce—Proposed Exhibit 74, an excerpt from a draft of expert David Tripp's report, and Proposed Exhibit 76, George Hunter's final report authenticating the Gold Pieces—qualify as inadmissible hearsay. The Langbords respond that they intend to introduce Proposed Exhibit 74 only to impeach Mr. Tripp if his testimony conflicts with his earlier report, a perfectly appropriate use of the draft document. As for George Hunter's final report, the Langbords claim that it qualifies as a report setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," under rule 803(8)(B). Hunter's authenticating report, say the Langbords, was prepared pursuant to a contract such that, despite his status as a non-government-employee, his report still qualifies as a public report under Rule 803(8)(B). Although not bound by any cited precedent, the Court concludes that an individual performing the limited task of authenticating the Gold Pieces was sufficiently supervised by the Mint for his report to qualify under the public record exception to the hearsay rule. See United States v. Davis, 826 F.Supp. 617, 621–22 (D.R.I. 1993).

D. Expert Witness Testimony

1. Eric Rauchway

The Langbords contend that a large portion of expert Eric Rauchway's report "directly

---

they recorded. The Langbords do not articulate this problem as one of inadmissible hearsay, though they point the Court toward cases dealing exclusively with hearsay issues. Instead, they seemingly contend instead that the lack of personal knowledge casts some suspicion on the documents' authenticity. The Court rejects this argument for two reasons: First, it relies on a set of cases that have incorrectly interpreted the ancient document hearsay exception. Second, it questions the truthfulness or accuracy of the documents-matters beyond the threshold authenticity inquiry under the ancient document rule. See Kairys, 782 F.2d at 1379.

usurp both the jury's quintessential function in determining how to weigh the evidence presented and how much weight to give particular forms of evidence, as well as the Court's function in guiding the jury—through instructions—as to the relevant considerations in making those assessments." (Doc. No. 156-1, at 4–5.) Professor Rauchway, a historian expert, focuses on how historians use documents and theories to draw conclusions. The Langbords do not object to Professor Rauchway's discussion of the gathering of historical evidence or the differences between primary and secondary sources. Rather, they complain that his opinions about how to evaluate contradictory sources and how to assess the hypotheses and conclusions that the Langbords' experts put forth go too far.

The Court is sensitive to the pitfalls of this type of expert testimony. Rarely are experts called upon to sort through pieces of historical information that, when taken one at a time, are relatively easily understood—especially when compared to the less accessible subject matters about which experts frequently opine. But the United States correctly notes that evaluating historical sources in a more technical manner falls outside of "the common knowledge of the average juror." United States v. Davis, 397 F.3d 173, 179 (3d Cir. 2005). And to the extent that Professor Rauchway can explain to jurors how, in his opinion, a historian embracing accepted methods would evaluate the information, he provides testimony that requires specialized knowledge and that will assist the trier of fact. Pineda v. Ford Motor Co., 520 F.3d 237, 244 (3d. Cir. 2008).

Some of Professor Rauchway's written opinion skirts a fuzzy line, however, and the Court takes this opportunity to note that, while he will be permitted to testify about his own methods in reaching a conclusion and about why historians accept and endorse those methods,

Professor Rauchway may not tell the jury how it should or must make those same determinations. A historian may be able to reach a particular conclusion when a jury, faced with the same information but required to apply the preponderance standard, may not. And Federal Rule of Evidence 704 provides that "an expert witness is prohibited from rendering a legal opinion." Berckeley Inv. Group, 455 F.3d at 217. On this basis, the Court previously explained that "if the witness avoids drawing legal conclusions, courts will permit expert legal testimony which 'sheds light on activities not within the common knowledge of the average juror.'" (Doc. No. 96, at 16 (quoting United States v. McDade, No. 92-249, 1995 WL 476230, at *3 (E.D. Pa. Aug. 7, 1995).) Although Professor Rauchway draws a historical, not a legal, conclusion regarding whether the Mint authorized issuance of 1933 Double Eagles, in order to avoid juror confusion, he may not refer to the legal burden of proof on direct examination.

2. Roger Burdette

The Langbords' numismatic expert, Roger Burdette, was formerly a member the Citizens Coinage Advisory Committee (CCAC), appointed by the Secretary of the Treasury. Because of this litigation and his work for the Langbords, he was required to resign his post for ethical reasons. The United States contends that "neither party should refer to Burdette's ethics issue, his former participation on the CCAC, or his resignation from the CCAC during the trial" (Doc. No. 151, at 5), presumably because the United States alerted Burdette to the ethical issue, forcing him to chose between testifying for the Langbords and maintaining his membership, and the jury might conclude that the United States employed an unfair litigation tactic in doing so.

The Court does not find the reasons that Burdette resigned from CCAC relevant to his ability to present an expert opinion in this matter and the Langbords shall not raise the issue

during Burdette's direct examination. They may, however, present his former membership as one of his expert qualifications. If the United States challenges Burdette's competence on the grounds that he is no longer a member of CCAC, Burdette can certainly explain the circumstances of his resignation to the jury.

E. Jury Instructions[14]

The Langbords propose three jury instructions about the adverse inferences the jury may draw from the Government's unconstitutional decision to keep the Gold Pieces without instituting forfeiture proceedings. Two of the three proposals lack any legal basis, and the third focuses on the Government's motives for its improper conduct, a matter wholly irrelevant to whether the Coins are the product of a theft or embezzlement.

First, the Langbords contend that "the exclusionary rule and its restorative and prophylactic purposes fully apply in the forfeiture context." (Doc. No. 155-1, at 5 (citing United States v. $92,422.57, 307 F.3d 137, 142 n.1 (3d Cir. 2002) for the proposition that "the Fourth Amendment's exclusionary rule applies to forfeiture cases").) They cite Supreme Court and other precedent holding that the Fourth Amendment's exclusionary rule applies to forfeiture cases because "a forfeiture proceeding is quasi-criminal in character." One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965). Even assuming that such a rule remains in effect,[15] their argument meets two insurmountable hurdles: first, the exclusionary rule does not

[14]This Order addresses only the proposed jury instructions in Claimants' Pretrial Motion #3 for Jury Instructions Based on the Government's Violation of the Langbords' Constitutional Rights (Doc. No. 155).

[15]The application of the exclusionary rule to civil forfeiture proceedings has been called into question. See United States v. Marrocco, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, C.J., concurring) (citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States v. Janis,

apply to civil forfeiture cases in which the claimant disputes the criminality of owning the object of the forfeiture action; second, the Langbords do not request that the Gold Pieces be excluded under the rule, but ask for an adverse inference jury instruction, a remedy that no authority supports.

Consider the two possible forfeiture cases where the alleged underlying crime is possession of contraband: In the first and more typical, there exist two relevant pieces of property: (a) property that is illegal to possess but which the government unconstitutionally seized; and (b) property that the government contends qualifies as an instrumentality or the proceeds of the alleged possession crime, but which itself is not illegal to possess—i.e., "derivative contraband." In these cases, the government seeks to forfeit derivative contraband, e.g., the car that a defendant used to transport drugs, and to do so, seeks to introduce evidence of the per se contraband. The second type of case, in which the government seeks to forfeit the property that gave rise to the possession crime, e.g., the drugs themselves, is exceedingly rare. After all, most people would not file a claim in a civil forfeiture action seeking to repossess per se contraband, like drugs, the possession of which would subject the individual to criminal penalties a second time. Id. at 699. Only where a claimant can admit possession, but challenge the government's contention that the property is per se contraband will that claimant appear and contest the forfeiture.

The Plymouth Sedan Court evinced a clear understanding of the distinction between these two types of forfeiture cases. It explicitly granted certiorari to consider whether the exclusionary

---

428 U.S. 433 (1976)).

rule applies to civil forfeiture proceedings with two pieces of property and ultimately concluded that it did. This holding makes sense: In a derivative contraband forfeiture, a claimant may rely on the exclusionary rule to prevent the government from introducing the per se contraband. If successful, he will maintain possession of the derivative contraband because the government cannot prove that it was an instrumentality or proceeds of a possession crime. The application of the exclusionary rule does not make sense when only one piece of property is at issue—that is, where the subject of the forfeiture and the piece of evidence that a claimant seeks to exclude are one in the same. When the claimant argues that it is legal to possess the property, he will likely rely on the fact of possession to establish ownership and attempt to retain the property.[16] If the exclusionary rule applied to this type of case, it would allow the claimant to prevent the United States from introducing evidence of possession, but would simultaneously defeat the claimant's ownership assertion. By limiting its holding to the more typical derivative contraband forfeiture case, Plymouth Sedan implicitly recognized that the exclusionary rule cannot logically apply to a forfeiture proceeding designed to adjudicate whether an object is per se contraband.

Perhaps realizing that their possession of the Coins undergirds their ownership claim, the Langbords do not urge the Court to apply the exclusionary rule here. Instead, they request an adverse inference jury instruction. The Court's extensive research has not revealed any authority for instructing the jury to consider the Government's seizure of the Coins when assessing whether the Coins are forfeitable. The exclusionary rule operates behind closed doors, keeping

[16]When discussing the Government's objections to the Langbords' proposed evidentiary presentation, the Court concluded that the Langbords may not draw legal inferences regarding the effect their possession of the Coins had on their ownership interest. The recognition that their previous possession of the Coins provides them with the necessary basis to contest the Coins' forfeiture does not change that ruling.

out the evidence obtained in violation of a litigant's rights without unduly prejudicing the Government's case. To highlight the Government's improper conduct to a jury, while allowing the Langbords to take advantage of the evidence the exclusionary rule would keep out, finds no legal or logical support.

The Langbords also urge the Court to give an adverse inference instruction based on spoliation principles. According to the Langbords, the First Circuit's decision in Nation-Wide Check Corp. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982) supports this theory. In Nation-Wide, a man left a jewel with a jeweler, who subsequently failed to return it. When the man sued, the jeweler claimed to have lost the jewel, making an accurate determination of the jewel's value impossible. The court instructed the jury to presume that the jewel was among the "best" jewels when determining damages. Drawing on nominal similarities between Nation-Wide and the forfeiture matter at hand—the Langbords, like the party in Nation-Wide, turned over valuables to a second party, and the second party refused to return them, prompting a law suit— the Langbords request an instruction telling the jury to presume that when the Mint did not return the Coins, it effectively admitted that it could not meet its burden of proof in a forfeiture action. But an adverse spoliation inference makes up for the missing or damaged evidence, holding the destroying party accountable. Here, there is no missing evidence; all ten 1933 Double Eagles still exist. The spoliation inference request is completely unfounded.

Lastly, the Langbords ask the Court to instruct the jury about the inferences they may draw from evidence tending to show a consciousness of guilt. Specifically, they compare the United State's decision to keep the coins to a criminal defendant's decision to fabricate a statement to avoid criminal liability. In Government of the Virgin Islands v. Lovell, 378 F.2d

799 (3d Cir. 1967), the Third Circuit held that a fabricated statement was "'receivable against [the defendant] as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.'" Id. at 806 (quoting II Wigmore on Evidence § 278(2) at 120 (3d ed.)). Whether a criminal defendant behaves in a way that suggests his guilt—*the* central question raised by a criminal case—has absolutely nothing to do with whether the Government here perceived its forfeiture case to be weak or strong. The Government need not establish that it possessed a particular state of mind to prevail, and what Mint officials perceived their legal obligations to be in 2004, when deciding to keep the Coins, is completely irrelevant. Again, the Langbords attempt to stretch a legal theory past its bounds with no logical or legitimate basis.

The Langbords alternatively ask the Court to instruct the jury as to how the Government came into possession of the Coins. This Order previously set forth the amount of background information that the Court will permit the parties to introduce through documents and testimony. As stated, the Langbords will not be permitted to discuss either the unlawful nature of the Government's seizure or draw inferences regarding any ownership interest that the Langbords believe their prior possession of the Coins suggests.

III. CONCLUSION

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROY LANGBORD, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al., Defendants.	:	CIVIL ACTION
UNITED STATES OF AMERICA, Third-Party Plaintiff, v. TEN 1933 DOUBLE EAGLE GOLD PIECES, Third-Party Defendant-in-rem.	:	No. 06-5315

ORDER

AND NOW, this 5th day of July, 2011, upon consideration of Claimants Joan, Roy, and David Langbord's Memorandum of Law with respect to the Declaratory Judgment Claim: In Response to the Government's Argument Concerning Jury Trial Right and in Support of Motion for Judgment on the Pleadings or Summary Judgment (Doc. No 169), and the United States's Response in opposition thereto (Doc. No. 173), the Court hereby DENIES the Langbords' Motion for Judgment and concludes that a jury trial right does not attach to the Government's declaratory judgment claim.

I. Availability of Declaratory Judgment

In an exercise of its discretion, district court may grant declaratory relief in accordance with the following statutory provision:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a). The Federal Rules of Civil Procedure further provide that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Fed. R. Civ. P. 57. Despite the broad nature of these provisions, declaratory relief "should not be granted where a special statutory proceeding has been provided." Katzenbach v. McClung, 379 U.S. 294, 296 (1964).

The Langbords challenge the United States's ability to bring a claim under the Declaratory Judgment Act on the ground that the Civil Asset Forfeiture Reform Act (CAFRA) is a special statutory proceeding that precludes concurrent declaratory relief. According to the Langbords, although no court has held that CAFRA provides a special statutory remedy, its "very specific steps, time-frames, burdens, remedies and limitations governing the government's ability to forfeit" property, and 18 U.S.C. § 981's "careful listing of what property is subject to forfeiture, as well as a number of procedural and substantive provisions related to civil forfeiture" mean that a CAFRA proceeding qualifies. (Doc. No. 169-1, at 13.)

The 1937 Notes of the Advisory Committee on Federal Rule of Civil Procedure 57 provides the basis for the restriction upon which the Langbords rely. It states that "[a] declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case." The Third Circuit has cited E. Borchard, Declaratory Judgments 342–46 (2d ed. 1941) as the relevant treatise discussing special state and federal statutory proceedings within the ambit of the Committee Note. See Lac D'Amiante du Quebec,

Ltee v. American Home Assur. Co., 864 F.2d 1033, 1042 n.11 (3d Cir. 1988). Borchard concluded that "special statutory proceeding" denotes a procedure that is intended as the exclusive means for adjudicating a particular category of case (e.g., income tax assessment cases or workers' compensation claims):

> It has already been noted that the declaratory action was not designed to interfere with the jurisdiction of special courts, but that on the contrary courts within their respective jurisdictions over persons and subject-matter were authorized by the Declaratory Judgment Acts to render declaratory judgments. Thus, when a probate court has jurisdiction over the construction of wills and matters of guardianship, it was not intended that courts of general jurisdiction should oust the jurisdiction of such special tribunals. In analogy thereto, where a special statutory procedure has been provided as an exclusive remedy for the particular type of case in hand, such as income tax assessment, tax abatement, workmen's compensation, unemployment compensation, annulment of a bigamous marriage, that specific recourse must be followed. Thus, a court should not by declaratory judgment ordinarily interfere with the jurisdiction of an administrative commission, especially where the statute is not ambiguous and where the jurisdiction of the committee depends on a jurisdictional fact . . . which the commission must in first instance determine.

Borchard, Declaratory Judgments 342–43.

Consistent with Borchard's understanding, since the enactment of the Declaratory Judgment Act, courts have recognized only a few of categories of cases as "special statutory proceedings" for purposes of the Advisory Committee's Note, including (1) petitions for habeas corpus and motions to vacate criminal sentences, e.g., Clausell v. Turner, 295 F. Supp. 533, 536 (S.D.N.Y. 1969); (2) proceedings under the Civil Rights Act of 1964, e.g., McClung, 379 U.S. a 296; and (3) certain administrative proceedings, e.g., Deere & Co. v. Van Natta, 660 F. Supp. 433, 436 (M.D.N.C. 1986) (involving a decision on patent validity before U.S. patent examiners). Each of these categories involves procedures and remedies specifically tailored to a limited subset of cases.

By contrast, although CAFRA supplies the necessary statutory authority for the United States to seek to forfeit property that qualifies as an instrumentality or the proceeds of a crime, the statutory remedy does not apply to a subset of criminal matters and CAFRA cases are not adjudicated by administrative tribunals or courts of special jurisdiction. See New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 478 (S.D.N.Y. 2005) (rejecting the argument that a Rule 17(c) motion to quash proceeding qualified as a "special statutory proceeding" because it could arise in any criminal matter).

Moreover, even if CAFRA did typically provide a special statutory remedy, it does not do so in this case. See McClung, 379 U.S. 296 (making exception to Civil Rights Act's special-statutory-provision status because a declaratory remedy was necessary). As the Court has remarked before, the United States plays two distinct roles here: As prosecutor, representing the people of the United States, it seeks to forfeit the proceeds of an alleged crime. But as the undisputed possessor and owner of the Double Eagles from the time they were stamped until the time they left the Mint, the United States attempts to reestablish legal title to property it claims it has always legally owned. Thus, although CAFRA could be considered the prosecutor's remedy, the forfeiture proceeding only resolves one of the two open questions in this case: were the Double Eagles stolen from the Mint and/or possessed by individuals who knew they were stolen, rendering them forfeitable under 18 U.S.C. § 641? If the United States does not meet its burden on the forfeiture count, whether the Langbords are the legal owners of the Double Eagles remains unanswered because a second question—did the Langbords ever obtain legal title to the Double Eagles by virtue of their leaving the Mint through authorized channels?—would remain. The declaratory judgment count provides a mechanism for determining the answer to the second

inquiry, relevant because of the United States's second role as previous lawful owners—and, according the United States, perpetually lawful owners—of the Double Eagles.

The Langbords also argue that the United States's declaratory judgment claim adjudicates only past conduct, and should accordingly be dismissed. See, e.g., Corliss v. O'Brien, 200 F. App'x 80, 84 (3d Cir. 2006). The Court is not persuaded. To make this argument, the Langbords highlight that the Court has already determined that the Government improperly seized the Double Eagles without appropriate process. They argue that this Court's ruling on the United States's past conduct should prevent the Government from pursuing declaratory relief now, and to allow otherwise would amount to a reassessment of that past conduct. But the Court has already determined that the United States did not delay in seeking declaratory relief in bad faith, but merely "pursued a misguided legal strategy" (Doc. No. 131, at 12), a decision it will not revisit now. Moreover, as the United States points out, it seeks a declaration to determine rightful ownership, one that involves an examination of past conduct, but which will resolve pending—not past—questions of title.

The Court accordingly denies the Langbords' motion for judgment on the pleadings or summary judgment and concludes that, despite the CAFRA claim that the United States pursues and the Court's previous determination that triggered this forfeiture proceeding, the Government may seek declaratory relief.

II. Jury Trial Right

Should the Court conclude that the declaratory judgment claim should remain part of this litigation, as it has, the Langbords ask to try the claim to a jury. Because declaratory judgments were created as a remedy in the federal courts before the merger of law and equity, see 28 U.S.C.

§§ 2201–2202, the Declaratory Judgment Act has a "neutral position on the jury trial," and "postmerger courts have found it necessary to preserve the distinction between law and equity." Owens-Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1189 (3d Cir. 1979). The "workable formula" is this:

> If the declaratory judgment action does not fit into one of the existing equitable patterns but is essentially an inverted law suit an action brought by one who would have been a defendant at common law[,] then the parties have a right to a jury. But if the action is the counterpart of a suit in equity, there is no such right.

Id. In other words, the Court must assess the basic nature of the issues involved in the case and determine if they would have arisen in law or equity had Congress not enacted the declaratory judgment act. See, e.g., Wallace v. Norman Industries, Inc., 467 F.2d 824 (5th Cir. 1972).

The United States's declaratory judgment claim fits into an equitable pattern: that of a quiet title action. In a quiet title action, a cloud upon title prevents the party who possesses property from possessing it free and clear of another's claim to it. Here, the Government possesses the coins and claims rightful ownership, but the Langbords' assertion that the Double Eagles legally belonged to Israel Switt and were legally inherited by the Langbord Claimants clouds the Government's title.[1] As quiet title actions are equitable in nature, no jury trial right attaches to them, and no jury trial right therefore attaches to the Government's declaratory judgment claim.

The test articulated Owens-Illinois mandates that Courts first determine whether a case

---

[1]The Court concludes that federal common law would apply to the Government's hypothetical quiet title action, meaning that whether Pennsylvania law limits quiet title actions to real property is of no import. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The United States has provided ample authority for the application of quiet title actions to personal property. (See Doc. No. 173, at 6 (citing, e.g., Hoelzer v. City of Stamford, 933 F.2d 1131, at 1135–36 (2d Cir. 1991)).)

"fit[s] into one of the existing equitable patterns," and, if not, requires an examination as to whether the case mirrors a legal action. Here, because the Government's claim fits into the quiet title pattern, the Court need not take the second step.

III. Conclusion

The Court accordingly DENIES the Langbords' Motion for Judgment and concludes that a jury trial right does not attach to the Government's declaratory judgment claim.

BY THE COURT:

/s/ Legrome D. Davis

Legrome D. Davis, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROY LANGBORD, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES DEPARTMENT OF	:	
THE TREASURY, et al.,	:	NO. 06-CV-05315
Defendants.	:	

Legrome D. Davis, J. July 28, 2009

MEMORANDUM

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This litigation arises out of a dispute between Plaintiffs and the United States Government over ten 1933 Double Eagle $20 gold coins. In August 2004, Plaintiffs Roy, Joan, and David Langbord, acting through their counsel Barry Berke ("Berke"), contacted the Chief Counsel for the United States Mint, Daniel Shaver ("Shaver"), and the Senior Legal Counsel for the United States Mint, Greg Weinman ("Weinman"), to inform them that they had discovered the Double Eagles in a family safety deposit box in Philadelphia. Plaintiffs assert that the coins had belonged to their late family member, Israel Switt ("Switt"), and passed to Plaintiffs following the deaths of Switt and his wife. According to Berke, he suggested to Shaver and Weinman that the parties discuss a "resolution similar to what was reached in the Fenton case," a mid-1990s case in which the Government initiated forfeiture proceedings against a 1933 Double Eagle. (Berke Dep. at 80:14-81:12, June 18, 2008.) In that case, the Government eventually

decided to dismiss its claims, auction the coin, and divide the profits with the coin's holder.[1] Shaver and Weinman testified at their depositions that Berke indeed suggested reaching some sort of agreement and that they responded that they "would be willing to discuss the matter," (Shaver Dep. at 96:16-97:2, June 12, 2008), and that they were "amenable to a discussion" on that topic (Weinman Dep. at 34:2-35:2, June 13, 2008). At the conclusion of that meeting, Shaver indicated that the Government would authenticate the coins. (Shaver Dep. 89:14-90:4.) Berke agreed. On September 15, 2004, Berke visited the Secret Service's offices in Brooklyn, N.Y., and met with Shaver, Weinman, and several Secret Service agents to discuss the coins. In the course of that meeting, there was a discussion between Berke and one of the Secret Service agents about venue, and Berke responded that his clients were prepared to waive venue. On September 21, 2004, the day before Plaintiffs would transfer the coins to the Government, Berke sent Shaver a letter that stated, in relevant part:

> I write on behalf of the Langbord family regarding their ownership of ten 1933 Double Eagle Coins ("the Coins.") At the request of the United States Mint, Roy Langbord will make the coins available to the government . . . based on our understanding that the government will test the Coins for authenticity and secure the Coins while we discuss a possible resolution of the issues relating to the Coins. This agreement to make available the Coins . . . is without prejudice to all of my clients' rights . . . We specifically reserve all rights and remedies with respect to the Coins.

(Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. E.) On the morning of September 22,

---

[1] In the mid-1990s, federal agents seized a 1933 Double Eagle from Stephen Fenton and initiated a judicial forfeiture proceeding in federal court in New York. The Government took the position in that case that the Double Eagle was the property of the United States because no 1933 Double Eagles had ever left the Mint through authorized channels. The Government eventually voluntarily dismissed its legal claim and agreed with Fenton to auction the coin. The auction yielded $7.59 million, which was divided between the Government and Fenton.

2004, the day of the transfer, Berke again met with Shaver and Weinman. During that meeting, both Shaver and Weinman confirmed that they had received Berke's letter. Plaintiff Roy Langbord, accompanied by Berke, opened the safe deposit box and turned the coins over to the Government.

According to a December 6, 2004, internal memorandum written to the then-Assistant Secretary of Treasury, a number of representatives from the different government agencies involved in the matter met on December 3, 2004, to discuss "how to proceed with the case." (Id., Ex. G at 1.) The agencies represented included the United States Attorney's Office for the District of Columbia, the United States Secret Service, the Treasury Department, and the United States Mint. The memorandum explained that "[a]ll the agencies involved, with the exception of the US Mint, are in favor of pursuing forfeiture." (Id.) The document further stated that "[t]he US Mint asserts that the coins are government property" and that there was therefore no "need for forfeiture." (Id.)

In May 2005, the United States Mint ultimately determined that the coins were in fact authentic 1933 Double Eagles. At a meeting in Washington, D.C., in June 2005, Shaver and Weinman informed Berke that the authentication had been completed and advised him that the Government would not offer any monetary settlement to Plaintiffs. On July 25, 2005, Berke sent Shaver a letter urging him to reconsider his position and requesting the immediate return of the coins. On August 9, 2005, Shaver responded with a letter stating:

> The United States Mint has no intention of seeking forfeiture of [the] ten Double Eagles because they already are, and always have been, property belonging to the United States; this makes forfeiture proceedings entirely unnecessary.

(Id., Ex. H.)

On September 9, 2005, Berke submitted a letter containing a "Seized Asset Claim" to Shaver and to the General Counsel of the Treasury Department, Arnold Havens ("Havens"). The Claim demanded either return of the coins or the initiation of a judicial forfeiture proceeding. Plaintiffs' Seized Asset Claim was allegedly based on the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983. Shaver responded on December 5, 2005 stating:

> [T]here has been no seizure of property; your client voluntarily surrendered to the United States property belonging to the United States. Therefore, there is no basis for a forfeiture action, and I have concluded that the documents you submitted do not constitute a cognizable claim under any law of the United States.

(Id., Ex. J at 2.)

Plaintiffs then submitted a "claim for damage" to the Treasury Department, via Havens, for damages in the amount $40 million dollars based on the "government's unlawful seizure, forfeiture, and conversion of the 1933 Double Eagle Coins." (Id., Ex. K at 3.) Shaver responded on June 6, 2006, requesting, among other things, "[p]roof of ownership" of the coins. (Id., Ex. L.) Berke responded on June 29, 2006, that Plaintiffs were the owners of the coins "by virtue of their being the ultimate beneficiaries under the wills of Elizabeth and Israel Switt." (Id., Ex. M at 1.) Shaver sent a final letter on November 6, 2006, informing Berke that "the Director of the United States Mint conclude[d] that the Langbord family . . . provided no evidence to suggest that it ever held title to the property in question, and as such, denied your claim." (Id., Ex. O at 3.)

In December 2006, Plaintiffs instituted this civil action against the United States, the Department of the Treasury, the United States Mint, and numerous officials thereof, including

Shaver, alleging causes of action for conversion, replevin, violations of CAFRA, violations of the Administrative Procedure Act ("APA"), and violations of Plaintiffs' Fourth and Fifth Amendment rights.

The parties have filed cross motions for summary judgment on Plaintiffs' CAFRA claim and on their Fourth and Fifth Amendment claims. Plaintiffs also move for summary judgment on their Administrative Procedure Act claim. Defendants move for summary judgment on Plaintiffs' replevin and conversion claims.

II. LEGAL STANDARD

In evaluating a motion for summary judgment, the court must consider whether "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party, and a factual dispute is material only if it might affect the outcome of the suit under governing law." Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Where the moving party has the burden of proof at trial, it has the burden at summary judgment "of supporting [his] motion[] with credible evidence . . . that would entitle [him] to a directed verdict if not controverted at trial." In re Bressman, 327 F.3d 229, 237 (3d Cir. 2003) (internal quotations omitted). In ruling on the motion, the court "may not weigh the evidence or make credibility determinations." Boyle v. City of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998); see Anderson, 477 U.S. at 255. Furthermore, all reasonable inferences from the record are drawn in favor of the non-movant. See Anderson, 477 U.S. at 255; J.F. Feeser, Inc. v.

Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991). "This standard does not change when the issue is presented in the context of cross-motions for summary judgment." Appelmans v. Philadelphia, 826 F.2d 214, 216 (3d Cir. Pa. 1987)

III. ANALYSIS

A. Plaintiffs' CAFRA Claims

Plaintiffs claim that Defendants violated CAFRA, 18 U.S.C. § 983(a) ("§ 983(a)"), because they did not comply with the notice and claim procedures set forth in that statute. The provisions of § 983(a) apply "in any non-judicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties." 18 U.S.C. § 983(a). A non-judicial civil forfeiture "is commenced when the Government sends notice of the forfeiture proceeding to potential claimants." Stefan D. Cassella, Asset Forfeiture Law in the United States 143 (2007). In fact, Plaintiffs concede that administrative forfeiture "consists of no more than notice by the Government that it intends to forfeit the property." (Pls.' Cross-Mot. Summ. J. CAFRA at 2 (citing Lopez v. United States, No. 96-1972, 2006 WL 2788999, at *10 (D.D.C. Sep. 26, 2006)). Here, it is undisputed that the Government never sent Plaintiffs such a notice. In fact, it is undisputed that the Government informed Plaintiffs that it believed that a forfeiture proceeding was "entirely unnecessary" and that it had "no intention of seeking the forfeiture of any 1933 Double Eagle." (Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. H.) Accordingly, we find that the Government never began an administrative forfeiture proceeding and therefore the requirements of § 983(a) do not apply.

Plaintiffs argue that we should nonetheless apply § 983(a) of CAFRA because, whether authorized by statute or not, the Government "in fact confiscated and forfeited the Coins

nonjudicially." (Pls.' Cross Mot. Summ. J. CAFRA at 2.) Plaintiffs do not cite any authority for the proposition that, where the Government did not technically begin an administrative forfeiture, but acted as if it had in fact administratively forfeited the property, § 983(a) of CAFRA should apply.[2] The leading treatise on the subject, which both parties cite to support their positions, specifically explains that the provisions in § 983(a) of CAFRA apply only where a nonjudicial forfeiture proceeding has been commenced under a civil forfeiture statute and do not apply "when the property is seized for some non-forfeiture purpose." Stefan D. Cassella, Asset Forfeiture Law in the United States 144 (2007); see DWB Holding Co. v. United States, 593 F. Supp. 2d 1271, 1272 (M.D. Fla. 2009) ("Although Plaintiff is correct that written notice is required within sixty (60) days after the date of seizure when there is a nonjudicial civil forfeiture proceeding, 18 U.S.C. § 983(a)(1)(A)(I), Plaintiff is incorrect that such notice is required in this instance because the United States has not commenced nonjudicial forfeiture proceedings."). As we mentioned above, the undisputed evidence here shows that the Government never intended to pursue a forfeiture process.

We find nothing in the language of CAFRA to indicate that § 983(a) is intended to govern "de facto" administrative forfeitures. In interpreting CAFRA, "our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." Negonsott v. Samuels, 507 U.S. 99, 104 (1993).

---

[2] Plaintiffs cite Via Mat Int'l S. Am. Ltd. v. United States, 446 F.3d 1258, 1263-64 (11th Cir. 2006) for the proposition that the plain language of CAFRA indicates that, "[o]nce a person files a claim, the Government is required to either initiate a judicial action or return the property." That case is inapposite, however, because it pertains to a situation where the Government had already initiated an administrative forfeiture proceeding prior to receiving the claim.

The plain meaning of CAFRA's language therefore controls "unless the language is ambiguous or leads to absurd results." United States v. Carrell, 252 F.3d 1193, 1198 (11th Cir. 2001). Here, we find that the language is not ambiguous. CAFRA clearly indicates that the provisions of § 983(a) only apply "in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute." 18 U.S.C. § 983(a). Therefore, because § 983(a) governs only the procedures of an administrative forfeiture and because no such forfeiture was ever pursued by the Government, we find the section inapplicable in this case.[3] Accordingly, we will grant summary judgment in favor of Defendants on Plaintiffs' CAFRA claim.

Plaintiffs argue that this interpretation leads to an absurd result because it would cause the Langbords to lose all their rights to the property and would allow the Government to retain the coins simply because it chose not to begin a forfeiture action. That is not the case. Although we hold that § 983(a) does not apply to the present situation, as we will explain below, we also hold that due process requires that the Government begin a judicial forfeiture proceeding in a timely manner. In addition, CAFRA's provisions that apply to all civil forfeiture actions will apply to the upcoming judicial proceeding.

B. Plaintiffs' Illegal Seizure Claims

---

[3] We note that, even if § 983(a) did apply to the present matter, the Government might still have had an opportunity to file a judicial forfeiture action. Section 983(a)(3)(A) allows a court to extend the period in which the Government is allowed to file a complaint for judicial forfeiture "for good cause shown." Courts have found good cause where the Government's decision not to bring a complaint was based on a mistaken belief that it had the independent legal authority to determine that a complainant lacked standing to challenge the forfeiture. See Hammoud v. Woodard, No. 05-74222, 2006 U.S. Dist. LEXIS 10248, at *10 (E.D. Mich. Feb. 17, 2006). Similarly, the Government's mistaken belief in this case that it was not legally required to file a forfeiture action is a legal error that could support a finding of good cause. Accordingly, had we found § 983(a) applicable here, we could have directed the Government to promptly file a judicial forfeiture action.

Plaintiffs assert that the Government violated their Fourth Amendment rights when it refused to return the coins. (Pls.' Opp'n Defs.' Mot. Summ. J. Due Process & Illegal Seizure at 19.) The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. iv. To determine whether Plaintiffs' Fourth Amendment rights were violated we must analyze whether there was indeed a seizure and, if so, whether that seizure was unreasonable.

1. Did a Seizure Occur?

A seizure of property occurs where "there is some meaningful interference with an individual's possessory interest." Id. In the present case, it is undisputed that, before the transfer to the Government, the coins were in the Plaintiffs' exclusive possession. However, the Government asserts that its taking of the coins was not a "seizure" for the purpose of the Fourth Amendment because the coins were voluntarily relinquished to the Government.[4]

The Government's position is initially weakened by the fact that the Secret Service's Investigative Support Division prepared a Notification of Contraband Seizure for the coins, indicating that the coins were seized on September 22, 2004, the date of the transfer in Philadelphia. (Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. F at 1.) The Notification

---

[4] The Government highlights that it took no coercive measures to prompt Plaintiffs' transfer of the coins. However, the Supreme Court has explained that, even where a seizure violates neither a person's liberty nor privacy, it is still subject to Fourth Amendment scrutiny based on its violation of the persons' property rights. Soldal v. Cook County, 506 U.S. 56, 65-66 (1992). The Court explained that this was the reason why, when property is seized under the "plain view" exception to the warrant requirement, it is still "scrupulously subjected to Fourth Amendment inquiry" and to probable cause analysis. Id. at 66.

further demonstrates that, although a seizure warrant was initially considered, it was decided that one was not necessary because Plaintiffs were cooperating with the Government. (Id. at 6.) However, it is clear from the undisputed facts submitted by both parties that Plaintiffs never intended to permanently relinquish the coins.

In order to justify a search or seizure through consent, the Government bears the burden of showing that the consent was "unequivocal, specific, [and] intelligently given." United States v. Salvo, 133 F.3d 943, 953 (6th Cir. 1998). The Government has presented absolutely no evidence to show that Plaintiffs gave their unequivocal and specific consent for the Government to permanently seize the coins. Weinman conceded that prior to the transfer, neither he nor Shaver informed Plaintiffs that they would keep the coins permanently without further agreement. (Weinman Dep. 45:18-46:12.) In fact, both indicated to Plaintiffs through Berke that they were amenable to discussing some type of agreement over the coins. (Shaver Dep. at 96:16-97:2; Weinman Dep. at 34:2-35:2.) Furthermore, in their pre-transfer letter, Plaintiffs specifically stated: "[We will] make the coins available to the government . . . based on our understanding that the government will test the Coins for authenticity and secure the Coins while we discuss a possible resolution of the issues relating to the Coins." (Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. E.) Whether or not that understanding was shared by the Government is of no import. The fact remains that Plaintiffs' letter communicated that Plaintiffs did not intend the transfer to be an unconditional, permanent surrender. In addition, once Plaintiffs became aware that the Government intended to keep the coins permanently, they promptly requested their return. Therefore, Plaintiffs withdrew any consent previously given for the Government to hold the coins.

These facts are in direct contrast with the case relied upon by the Government in which the plaintiff clearly and unequivocally surrendered the property to the Government with absolutely no discussion of limits or expectations. United States v. Messina, 507 F.2d 73, 75 (2d Cir. 1974) (where the complainant admitted to having sold stolen sweaters, handed over the remaining sweaters to the police saying, "[i]f you want these sweaters, you can have them," and indicated that he wanted to "help" and "cooperate" with the police investigation regarding the stolen goods).[5]

We find persuasive the decisions of the several Courts of Appeals that have held that, where a person's consent for the Government to hold their property "was unilateral and contained no agreement as to duration" that consent is "implicitly limited by [the plaintiff's] right to withdraw his consent and reinvoke his Fourth Amendment rights." Mason v. Pulliam, 557 F.2d 426, 429 (5th Cir. 1977) (finding that, where the complainant authorized the IRS to examine his business records and subsequently demanded their return, the IRS was required to return the materials); see United States v. Ward, 576 F.2d 243, 244 (9th Cir. 1978) (same). Once the person withdraws that consent and reinvokes his Fourth Amendment rights, the Government's possession becomes a seizure because it interferes with the individual's possessory interests. Mason, 557 F.2d at 429. One of the courts applying this approach explained that, in consenting

---

[5] The Government also cites Brown v. Brierley, 438 F.2d 954, 957 (3d Cir. 1971), for the proposition that voluntarily relinquished property is not seized. However, Brown is inapposite because, unlike in the present matter, in that case the complainant never denied that he indeed completely relinquished a gun to the police and authorized its sale. His only argument was that his agreement was procured through coercion.

to allow the Government to possess certain property, the plaintiff had a right to expect fair treatment. Vaughn v. Baldwin, 950 F.2d 331, 334 (6th Cir. 1991) (finding that the IRS violated the plaintiff's Fourth Amendment rights when it requested the plaintiff's documents to photocopy them, rejected several requests for their return, and only returned them after the plaintiff sued to get them back). The court characterized the government's attitude as "the joke is on you[,] [y]ou shouldn't have trusted us." Id.

We find that the Mason line of cases is clearly applicable here. Far from being an unconditional surrender, the Plaintiffs' pre-transfer letter clearly communicated that they consented to the Government holding the coins while the Government authenticated them and while the parties attempted to reach a resolution. Plaintiffs unequivocally withdrew consent for the Government's possession via Berke's July 25, 2005, letter to Shaver requesting return of the coins. At that point, the Government decided to keep the coins for their own purposes. As the Supreme Court has explained, when the Government chooses "to exert dominion and control over the [property] for their own purposes," the taking "clearly constitute[s] a 'seizure.'" United States v. Jacobsen, 466 U.S. 109, 122 (1984). Accordingly, we find that the Government's possession became a seizure once it refused to comply with Plaintiffs' request to return the coins.

The Government further argues that it was justified in taking the coins because "the law recognizes a distinction in Fourth Amendment analysis where the government recovers its own property."[6] (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 18.) Courts

[6] While there are certain circumstances in which the Government may seize property that it has probable cause to believe is contraband, see e.g., United States v. Troiano, 365 F.2d

have consistently rejected this type of argument. For example, the Eighth Circuit Court of Appeals has highlighted that "[a] seizure of property occurs when there is some meaningful interference with a person's possessory interests in that property," and that person's "right against unreasonable seizures is not vitiated" merely because the Government believes that it is the rightful owner of the property in question.[7] Lesher v. Reed, 12 F.3d 148, 150 (8th Cir. 1994). Even where "a claim to continued possession is in dispute, that possessory interest is still constitutionally protected." Dixon v. Lowery, 302 F.3d 857, 864 (8th Cir. 2002). Furthermore, "[c]onstitutional protection of possessory interests is not diminished when the government, as opposed to a private individual, has paramount right to possession." Rossi v. Town of Pelham, 35 F. Supp. 2d 58, 69 (D.N.H. 1997) (citing Warden v. Hayden, 387 U.S. 294, 300-310 (1967)). Accordingly, we find that the Government's belief that the coins had been stolen did not diminish Plaintiffs' Fourth Amendment rights and did not change the nature of the Government's seizure.

2. Was the Seizure Reasonable?

Having found that the Government's actions constituted a seizure, we must next

---

416, 418 (3d Cir. 1966), the Government in this case has not argued that its belief that the coins were stolen would be sufficient to support a finding of probable cause.

[7] The cases cited by the Government to support the argument that it acted properly in recovering its own property are inapposite. They each address situations where the government's ownership of the property was undisputed or where there were statutes or regulations dictating that the particular property belonged to the Government. See United States v. Sellers, 12 U.S.C.M.A. 262, 265 (C.M.A. 1961) (indicating that, prior to the government's taking of the property, the complainant had been ordered by his military superior to return the property, which undisputedly belonged to his military battalion); Davis v. United States, 328 U.S. 582, 588 (1946) (indicating that there was a statute that specified that the gasoline coupons at issue were government property subject to inspection and recall by the government); United States v. Stern, 225 F. Supp. 187, 193, 195 (S.D.N.Y. 1964) (finding that, under IRS regulations, the forms seized were government property that could only be possessed by IRS agents).

determine whether the seizure was reasonable. Ordinarily, "the Supreme Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." Brown v. Muhlenberg Twp., 269 F.3d 205, 210 (3d Cir. 2001). Although there are several judicially recognized exceptions to the warrant requirement, the Government in this case does not argue that any specific exception applies here. Instead, it argues that its conduct was reasonable under the circumstances. In the absence of the Government's assertion of a particular exception, our determination of what is reasonable "requires a balancing of the 'nature and extent of the governmental interests' that justify the seizure against the 'nature and quality of the intrusion on individual rights' that the seizure imposes." Johnson v. Campbell, 332 F.3d 199, 205 (3d Cir. 2003).

Here, the Government's asserted interest was in protecting coins that it believed to have been stolen from the Government several decades earlier. The Plaintiffs' interest was in preserving their right to possession of coins that they had allegedly inherited. The question before us is whether the Government's interest justified the "nature and quality" of the seizure.

The Government asserts that its actions were justified, in part, because Plaintiffs consented to the transfer of the coins. However, as we explained above, the seizure actually came into being when Plaintiffs expressly withdrew their consent and demanded the return of the coins. Accordingly, Plaintiffs clearly did not consent to the seizure of the coins.

The Government also argues that its actions were reasonable because it had a "good-faith and well-founded belief that . . . it was taking possession of property that, if authentic, had always belonged to the United States." (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal

Seizure at 20.) However, as the Supreme Court has explained:

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law.

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304 (1967).[8] The Government here does not argue that its belief that the coins were stolen amounted to probable cause to believe that they were seizing contraband subject to forfeiture, which might have been sufficient to justify the seizure.[9] Instead, the Government simply argues that it held its belief in "good-faith" and that its actions are reasonable when viewed in the context of that belief. (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 20.)

In asserting the reasonableness of its actions, the Government relies heavily on the 1947 decision in United States v. Barnard, 72 F. Supp. 531 (D. Tenn. 1947), which found that a 1933 Double Eagle had not left the mint through legal means. However, the court in Barnard was

---

[8] Hayden provides a useful context in which to read Boyd v. United States, 116 U.S. 616 (1886). The Government cites Boyd for the proposition that the government is held to different constitutional standards when recovering its own property. Boyd stated in dicta that, in the case of "[t]he search for and seizure of stolen or forfeited goods . . . the government is entitled to the possession of the property" because "[t]he seizure of stolen goods is authorized by the common law." Id. at 623. We read Boyd in light of the statement in Hayden that "seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law." 387 U.S. at 304.

[9] The Third Circuit has found that a "warrant is not required for seizure in a forfeiture action" and such an action need only show probable cause. United States v. One 1977 Lincoln Mark v. Coupe, 643 F.2d 154, 158 (3d Cir. 1981). However, the Government has vigorously argued that this case does not involve a forfeiture action. Furthermore, in some circumstances the Government may seize property that it has probable cause to believe is contraband. United States v. Troiano, 365 F.2d 416, 418 (3d Cir. 1966). Nevertheless, the Government in this case has never argued that its belief that the coins were stolen would be sufficient to support a finding of probable cause. Accordingly, we need not address that question.

simply ruling on the evidence that it had before it at the time. The decision did not serve as a blanket authorization for future warrantless seizures of 1933 Double Eagles. Furthermore, the Government in Barnard had brought a judicial replevin action to attempt to recover the coin. In that sense, far from supporting the reasonableness of a warrantless seizure, Barnard serves as an example of a reasonable course of action available to the Government to recover a coin that it believed to have been stolen.

The Government provides no reason why it could not obtain a warrant to properly seize the coins as contraband once they were under its control with Plaintiffs' consent. As we explained above, the actual seizure of the coins occurred once the Government chose not to honor Plaintiffs' request to return the coins. At that point, the coins were safely in the Government's possession. The Government authenticated the coins in May 2005, approximately two months before Plaintiffs requested return of the coins. Therefore, the Government had ample opportunity after authentication to request a seizure warrant without compromising the safety of the coins. We find that the Government's "good-faith" belief that the coins were once stolen is not sufficient, under the circumstances, to justify its decision to conduct a warrantless seizure. The Government's interest in protecting the coins would have been equally protected by a search pursuant to a seizure warrant.

Given the undisputed circumstances in this case, we find that the seizure was objectively unreasonable and that the Government has presented no evidence from which a reasonable factfinder could conclude otherwise. Accordingly, we will grant summary judgment in favor of Plaintiffs on their Fourth Amendment claim.

3. Adequate Remedy

Our holding does not imply that the Government will be required to return the coins immediately. Indeed Plaintiffs concede that return is not required if the Government promptly initiates a judicial forfeiture proceeding. (Pls.' Mot. Summ. J. Due Process & Illegal Seizure 24). Also, it is well established that "illegal seizure of property does not immunize it from forfeiture as long as the government can sustain the forfeiture claim with independent evidence." United States v. Pierre, 484 F.3d 75, 87 (1st Cir. 2007); see United States v. 47 West 644 Route 38, 190 F.3d 781, 782 (3d Cir. 1999). For the reasons explained in the next section, we will require the Government to promptly initiate a forfeiture action.

C. Plaintiffs' Due Process Claims

Both parties have moved for summary judgment on Plaintiffs' Fifth Amendment claim. Plaintiffs argue that the Government violated their Fifth Amendment procedural due process rights when it deprived them of the coins without due process.[10]

"Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). In analyzing Plaintiffs' claim, the first question we must ask is "whether the plaintiff has alleged the violation of a clearly established statutory or constitutional right." Samuel v. Holmes, 138 F.3d 173, 176 (5th Cir. 1998). If we find that the Due Process Clause was indeed triggered, we must then "ask what process the [government] provided, and whether it was constitutionally

[10] In its initial Motion for Summary Judgment on Plaintiffs' Due Process and Illegal Seizure claims, the Government argued that Plaintiffs were not entitled to due process because, at the time of transfer, the Government had not reached an implied agreement with Plaintiffs to begin a forfeiture action. However, after Plaintiffs responded that their claims were not based on any implied agreement, the Government expressly abandoned that argument. Accordingly, the question before us is not whether there was ever an implied agreement, but rather whether the Government's actions violated Plaintiffs' rights under the Fifth Amendment.

adequate." Zinermon v. Burch, 494 U.S. 113, 126 (1990). We address each issue below.

1. Applicability of Due Process

To determine whether the alleged violation triggers due process, "we must look . . . to the nature of the interest at stake" and decide whether it is the type of property interest protected by due process. Anderson v. Philadelphia, 845 F.2d 1216, 1220 (3d Cir. 1988) (citing Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972)). The Supreme Court has made clear that "the property interests protected by procedural due process extend well beyond actual ownership." Roth, 408 U.S. at 571-572. However, in order to determine the specific nature of Plaintiffs' interest we must look to state law. Id. at 577; see Brown v. Trench, 787 F.2d 167, 170 (3d Cir. 1986) ("State law determines whether such a property interest exists.").

This court previously addressed the question of whether, under Pennsylvania law, possession alone creates a sufficient property interest to trigger due process rights in Justice v. Fabey, 541 F. Supp. 1019, 1022 (E.D. Pa. 1982) (applying Pennsylvania law). There, the police had seized a truck from the plaintiff without due process. The plaintiff had allegedly obtained the truck as a bonafide purchaser from a party whose possession was traceable to the theft of the truck from its true owner. The plaintiff, therefore, appeared to lack good title to the truck. The court found, however, that "while plaintiff may not be able ultimately to establish good title to the seized truck under Pennsylvania law, this does not conclusively determine whether the police were required under the due process clause to afford him some kind of hearing when they sought to take possession of the truck." Id. The Justice court explained that, under Pennsylvania law, "[i]t is settled . . . that possession of a chattel is deemed to be prima facie evidence of ownership." Id. at 1023. The court further found that "any person claiming ownership of

property which is in the possession of another bears the burden of proving facts essential to his claim of ownership." Id. It therefore concluded that "one's earlier possession of property, which has subsequently been seized, is prima facie evidence of one's entitlement to the property" and is sufficient to establish a protected possessory interest. Id.

In this case, it is undisputed that the coins, when first acquired by the Government, were in the exclusive possession of Plaintiffs. There is no argument that Plaintiffs themselves ever stole the coins. In fact, it is undisputed that Plaintiffs came into possession of the coins because they had once been held by now-deceased family members. We find that Plaintiffs' possession of the coins is similar to that of the plaintiff in Justice in that, although it may turn out that the original family member who obtained the coins never had good title, Plaintiffs are still entitled to the protections of due process by virtue of their original possession of the coins and their asserted claim of ownership. Accordingly, we find that, in light of Pennsylvania law "which attaches a presumption of entitlement to one in possession," Plaintiffs have established a sufficient property interest to trigger due process rights. Id.

The Government argues that the presumption created under Pennsylvania law should not apply in this case because Plaintiffs "have offered no evidence to demonstrate a cognizable interest in the 1933 Double Eagles" and "have no facial possessory interest in the coins." (Defs.' Mem. Supp. Mot. Summ. J. Due Process & Illegal Seizure at 9, 12.) Here, Plaintiffs clearly assert that they have a possessory interest in the coins because they were passed down to them through their deceased family members. We find that this assertion, combined with the fact that Plaintiffs did in fact possess the coins prior to the transfer, is sufficient to establish a facial possessory interest. Although the Government disputes whether Plaintiffs lawfully inherited the

coins, as the Supreme Court has made clear, even where a party lacks full title to a chattel and his "right to continued possession" is "a matter in dispute," his possessory interest is nonetheless constitutionally protected as a significant property interest. Fuentes v. Shevin, 407 U.S. 67, 84 (1972). "Constitutional protection of possessory interests is not diminished when the government, as opposed to a private individual, has paramount right to possession." Rossi v. Town of Pelham, 35 F. Supp. 2d 58, 69 (D.N.H. 1997). The Justice court also addressed this issue directly when it stated, "[t]he fact that a possessor's claim of ownership may be disputed does not negate the existence of a property interest or his right to procedural safeguards." 541 F. Supp. at 1022. Other courts have similarly found that, even where the Government is attempting to recover property that allegedly belongs to the Government, it must still bring an action to recover that property. See United States v. One Parcel of Real Prop., 34 F. Supp. 2d 107, 114-115 (D.R.I. 1999) (finding that, to obtain the allegedly stolen Government property from the plaintiffs, the Government had the choice of suing the plaintiffs for the property or initiating a forfeiture action). Accordingly, we find that Plaintiffs have established a sufficiently significant possessory interest to trigger the application of due process.[11]

---

[11] The cases cited by the Government for the proposition that due process requirements are different where the Government is recovering its own property are inapposite because not one of those cases deals with the question of whether due process was triggered. Furthermore, the cited cases address situations where ownership was undisputed or where there were statutes or regulations dictating that the particular property belonged to the Government. In United States v. Sellers, 12 U.S.C.M.A. 262, 265 (C.M.A. 1961), it was undisputed that the property belonged to the Government and that the plaintiff was required under military law to surrender it once his military superior ordered him to do so. In Davis v. United States, 328 U.S. 582, 588 (1946), there was a statute that specified that the specific subject property, government-issued gasoline coupons, were subject to inspection and recall by the Government. Finally, in United States v. Stern, 225 F. Supp. 187, 195 (S.D.N.Y. 1964), the property at issue consisted of internal government forms that, by IRS regulation, were made Government property which the public was not allowed to possess.

2. Sufficiency of the Process Provided

Having found that Plaintiffs were entitled to due process, we must next determine the type of process that Plaintiffs were due. The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001). Here the Government argues that Plaintiffs were provided sufficient process when they "were afforded and took advantage of an administrative claims process in which they had the opportunity to . . . provide evidence of their purported interest."[12] (Pls.' Reply Opp'n Defs.' Mot. Summ. J. Due Process & Illegal Seizure at 4.) They further argue that Plaintiffs were given due process because they "had meetings, [and exchanged] telephone calls and correspondence" which gave them an "unlimited opportunity to 'speak up' with regard to their purported rights in" the coins. (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 17.)

The only official that corresponded with Plaintiffs regarding their claims for return of the coins and compensation for the seizure was Shaver, the Chief Counsel of the Mint, who was one of the primary officials in charge of procuring the seizure. When Plaintiffs initially requested return of the coins, Shaver responded that no seizure had occurred and that no forfeiture was necessary because the coins already belonged to the Government. When Plaintiffs then

---

[12] The Government cites Deninno v. Municipality of Penn Hills for the proposition that, if there is "a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants." 269 Fed. Appx. 153, 157 (3d Cir. 2008). However, Deninno also states that, once the plaintiff exhausts such remedies, he may bring an action in federal court for deprivation of due process. Id. at 156. Here, Plaintiffs clearly attempted to exhaust all administrative remedies, first through a purported CAFRA claim for return of the coins and then through their Claim for Damages. Accordingly, we find that Plaintiffs did not "skip" any process available to them.

submitted a claim for damages to the Department of Treasury, Shaver again responded, demanding, among other things, proof of ownership of the coins. Once Plaintiffs submitted an explanation that they owned the coins by virtue of inheritance, Shaver informed Plaintiffs that they had failed to meet their burden and that their claim was denied. No hearing was ever held.

In determining whether the process given complies with the requirements of due process, we apply the balancing test outlined by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), which requires us to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. First, as we explained above, the private interest at issue was Plaintiffs' interest in the possession of the coins which they purport to own as a result of inheritance. Second, the risk of an erroneous deprivation appears to be significant given the fact that the only official apparently in charge of responding to Plaintiffs' claims was Shaver, the very person whose actions were the subject of Plaintiffs' claims and who can hardly be said to provide the neutrality that due process requires. See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 617-618 (1993) ("[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation 'which would offer a possible temptation to the average man . . . which might lead him not to hold the balance nice, clear and true."). Turning now to the probable value of the additional safeguards, we note that the Court has emphasized the importance of neutrality in the process provided:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). The Court has further stated that a neutral hearing is especially valuable where, as here, "the Government has a direct pecuniary interest in the outcome of the proceeding." United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 (1993). Accordingly, we find that the risk of erroneous deprivation here was sufficiently high as to make a hearing before a neutral adjudicator especially important. With regard to the timing of the hearing, the Good Court emphasized the importance of a predeprivation hearing designed to protect the plaintiff's "possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property." Id. at 53. Absent exigent circumstances, "prior notice and a hearing is central to the Constitution's command of due process." Id. We find that, given the circumstances in this case, a predeprivation hearing would have provided safeguards that were particularly important given Shaver's potentially biased position.

Under the third element of the Mathews test, we must examine the Government's interest and the potential burden presented by additional safeguards. Here, the Government's asserted interest is an "interest in recovering and securing its stolen property." (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 14.) While this interest is indeed significant, the Government fails to argue why providing a hearing would have in any way affected that interest or constituted a significant burden. The only argument that the Government makes in regard to

this question is that a hearing would have been impractical because "relinquishing possession of the 1933 Double Eagles at any time before a final judicial resolution of this matter would have created a substantial and unnecessary risk that the 1933 Double Eagles once more would disappear" because "the coins were small and easily concealed." (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 16-17.) However, this argument is wholly unsupported by the undisputed facts in this case. The Government took control of the coins in September 2004. It authenticated the coins in May 2005. As we explained above, the actual seizure in this case occurred when the Government failed to honor Berke's July 25, 2005, letter requesting return of the coins. (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. P.) Therefore, the Government had eight months from the time of taking possession and two months from the time of authentication during which to initiate a predeprivation forfeiture proceeding while the coins were safely under its control. Under those circumstances, a predeprivation hearing presented no risk of loss. We find that the Government has not presented any burden that would have been created by the requirement to provide Plaintiffs a hearing.

With regard to the timing of the hearing, it is well established that, "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation . . . remedy." Zinermon v. Burch, 494 U.S. 113, 132 (1990). The Government concedes that predeprivation hearings are favored where feasible but argues that a postdeprivation hearing was sufficient in this case because of the risk of losing the coins. As we explained above, because the coins were in the Government's possession at the time of the seizure, no such risk existed. Accordingly, the Government has presented no reason why a predeprivation hearing would have been impractical.

Accordingly, after considering each of the Mathews factors, we find that the Government clearly deprived Plaintiffs of their due process rights by denying them a predeprivation hearing before a neutral official. Therefore, we will grant Plaintiffs' Motion for Summary Judgment of their due process claims and deny the Defendants' cross-motion.

3. Adequate remedy

Having determined that a due process violation occurred, we turn to the appropriate remedy. Where a court concludes, as we have here, that the Government seized property without due process and intends to retain the property, we must "order the government to either return the [property] to the plaintiffs or to commence judicial forfeiture . . . at which time the plaintiffs may raise whatever defenses are available to them." Garcia v. Meza, 235 F.3d 287, 292 (7th Cir. 2000); see United States v. Von Neumann, 474 U.S. 242, 251 (1986) (finding that, with regard to seized property that is allegedly subject to forfeiture, the plaintiff's "right to a forfeiture proceeding . . . satisfies any due process right"); United States v. Giraldo, 45 F.3d 509, 512 (1st Cir. 1995) (finding that, where the process provided is constitutionally inadequate, the court must direct the government to return the property or begin a judicial forfeiture proceeding). The Federal Circuit has explained the relationship between due process and a forfeiture proceeding as follows:

> [T]he courts have recognized a right not to have property held in such settings for an unreasonable time and have crafted a remedy to vindicate that right. Following the seizure of property, the owner of the property has a due process right to have the government either return the property or initiate forfeiture proceedings without unreasonable delay.

Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1334 (Fed. Cir. 2006).

Here, the initiation of a judicial forfeiture proceeding for the coins is specifically

authorized by statute. The Secret Service's Notification of Contraband Seizure presented in this case specified that the coins were seized as contraband obtained in violation of 18 U.S.C. § 641, which pertains to the embezzlement and theft of public money, property, or records. (Pls.' Mot. Summ. J. Due Process & Illegal Seizure, Ex. F at 1.) 18 U.S.C. § 641(a)(1)(C) specifically authorizes the forfeiture of property obtained in violation of 18 U.S.C. § 641.

For these reasons, we find that the appropriate and authorized remedy for the Government's denial of Plaintiffs' due process rights is a prompt forfeiture hearing. Accordingly, we will direct the Government to initiate a judicial forfeiture proceeding as part of this action on or before Monday, September 28, 2009.

D. Unclean Hands Defense

Defendants argue that, even if we find that Plaintiffs' rights were violated, we should not grant them relief because they allegedly had "unclean hands." Courts apply the doctrine of unclean hands when the "party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." Highmark Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 174 (3d Cir. 2001) (citations omitted). Here, Defendants assert that: (1) Roy Langbord saw an advertisement that mentioned Israel Switt in connection with Double Eagles in 2002; (2) Joan Langbord had a catalog for the Fenton auction; and (3) Joan Langbord visited the safety deposit box around the time of the auction. Defendants therefore argue that "a fact finder . . . easily would conclude that [Joan Langbord] was aware of her possession of stolen government property for at least two years before she claims to have found the coins." (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure at 23.) However, the Government's argument assumes the answer to the ultimate question at issue in this matter. Even assuming that

the Langbords were aware of their possession of the coins in 2002, none of the evidence presented by the Government would allow a factfinder to conclude that they knew the coins were stolen. No court has yet determined that these particular coins were ever stolen. The Langbords' alleged knowledge about the Fenton case is similarly irrelevant because that case never concluded that any Double Eagle had ever been stolen. Therefore, the Government's argument that the Langbords "knew" a fact that has never been conclusively established amounts to unsupported speculation.

The Government further argues that Plaintiffs had unclean hands because they "elected not to acknowledge possession of the 1933 Double Eagles and excluded them from Switt's estate inventory and tax documents." (Defs.' Opp'n Pls.' Mot. Summ. J. Due Process & Illegal Seizure 24.) First, the executor of Switt's estate was Staton Langbord, not Plaintiffs, and therefore it was he who would have been responsible for those documents. (Defs.' Mot. Summ. J. Illegal Seizure & Due Process, Ex. J.) Furthermore, for Plaintiffs' conduct to support an unclean hands theory, it must bear a close nexus to the relief requested. Highmark Inc., 276 F.3d at 174. We find that the nexus between tax payments and Plaintiffs' Fourth and Fifth Amendment rights is not close enough to merit application of the theory.

For these reasons, we find that the unclean hands doctrine does not apply here.

E. Plaintiffs' Administrative Procedure Act Claim

Plaintiffs move for summary judgment on their claims pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 704. The threshold requirement for applicability of the APA is that the agency decision in question be an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Here, Plaintiffs have an adequate remedy by virtue of their Fourth and Fifth Amendment violation claims. That remedy, which we grant for the reasons explained above, consists of requiring the Government to promptly initiate a forfeiture action. That is the same remedy that Plaintiffs apparently request under the APA. Therefore, we find that, because Plaintiffs clearly have another "adequate remedy in a court," the APA is inapplicable in this case. Accordingly, we will deny Plaintiffs' motion for summary judgment with respect to their APA claim.

F. Plaintiffs' Replevin and Conversion Claims

Because Plaintiffs' replevin and conversion claims will necessarily involve many of the same factual issues that will need to be addressed as part of the Government's forfeiture action, we find that it would be in the best interest of justice to postpone ruling on any issues regarding those claims until after the completion of that action.

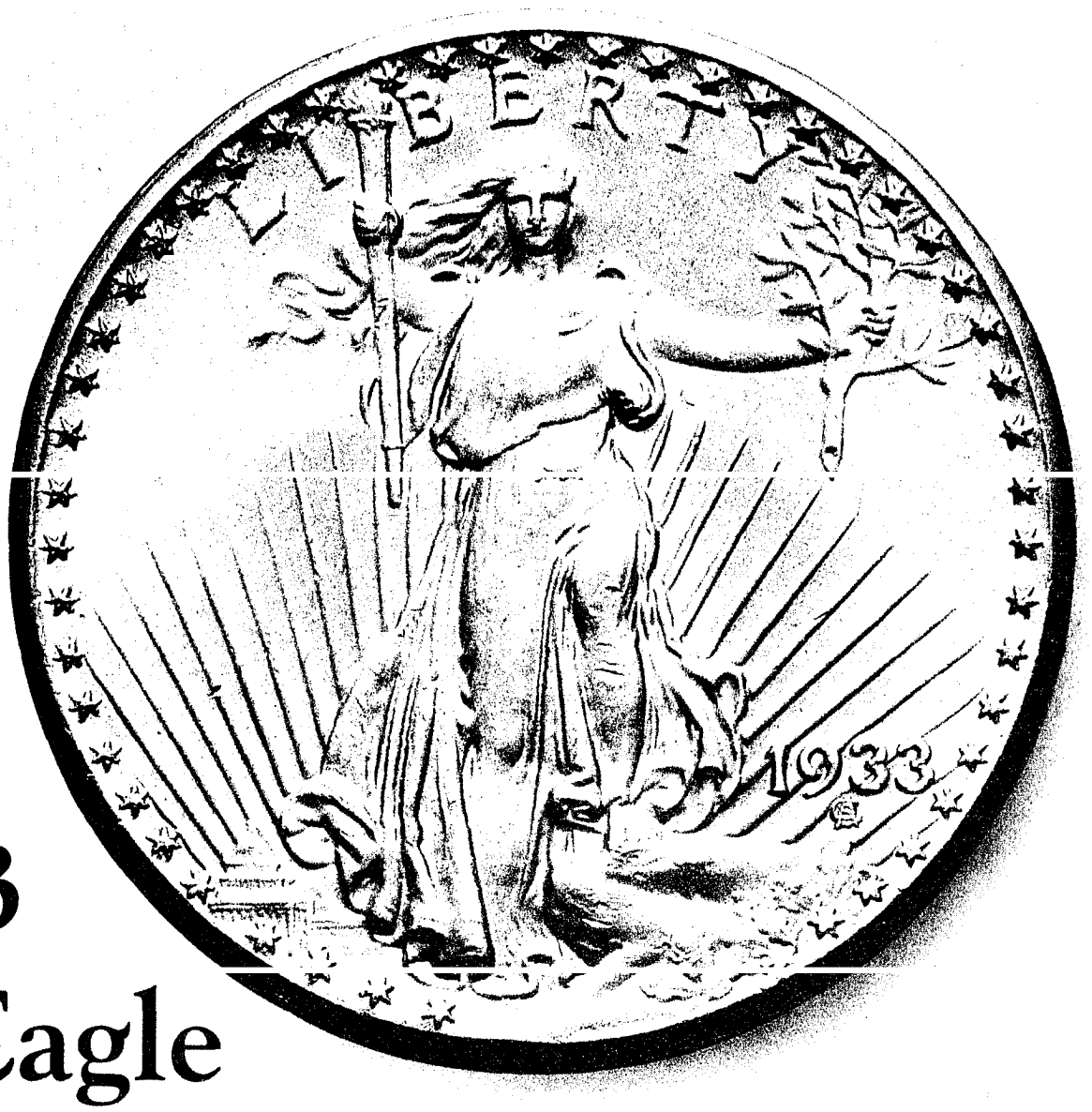
Accordingly, we will deny Defendants' Motion for Summary Judgment on Plaintiffs' replevin and conversion claims without prejudice with leave to reinstate upon written request by Defendants following the conclusion of the judicial forfeiture proceeding.

III. CONCLUSION

The Government has vigorously argued throughout this case that it should not have to follow the requirements established by the Fourth and Fifth Amendments to recover what it believes to be its own property. However, we find that such a holding would be contrary not only to the governing law, but also to the bedrock principles of justice on which our government is founded. It is axiomatic that "men naturally trust in their government, and ought to do so, and they ought not to suffer for it." Menges v. Dentler, 33 Pa. 495, 500 (1859). The Government must not squander that trust. Instead, the Government must invariably respect the wise restraints

embodied by the Constitution and must follow the clearly delineated paths to justice that they create. Seeking shortcuts to these paths does nothing more than undermine their valuable function and erode the meaning of the rights they are designed to protect. As Justice Black once explained, "[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting). Through the forfeiture proceeding the Government will have the opportunity to "turn square corners" by asserting its ownership of the coins while affording Plaintiffs the process they deserve.

An appropriate Order follows.



And then there was one...

The 1933 Double Eagle

First there were nearly half a million, then there were ten and then there was one. The fabulous 1933 Double Eagle, never before issued by the United States, and for nearly 70 years illegal to own. By direction of the United States Mint, Sotheby's/Stack's will offer for sale the only example authorized for private ownership by the United States Government. Estimate: $4,000,000-$6,000,000

It's a tale any numismatist worth his magnifying glass knows well, but for the rest of us, the story goes something like this. In 1907, Theodore Roosevelt commissioned Augustus Saint-Gaudens to design a United States coin worthy of the ancient Greeks. With Miss Liberty on one side and an eagle soaring across the sun's rays on the other, many believe the coin achieved the goal.

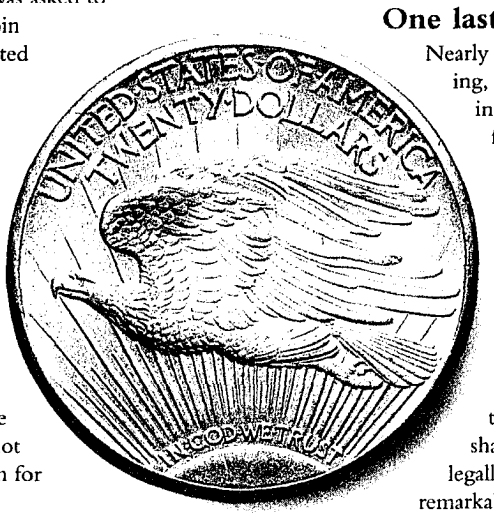
In 1933, the last Double Eagles with this design were struck but not until Theodore Roosevelt's cousin Franklin took the United States off the gold standard. The 1933 Double Eagle was extinct before it ever saw the light of day or the inside of an American's pocket. All but the two sent to the Smithsonian Institution were to be left in storage and eventually destroyed. Not one was ever deemed legal tender.

The coins are destroyed?

In 1937, all the remaining 1933 Double Eagles were turned back into gold bars. But, on February 15, 1937, Israel Switt an "old gold" dealer sold a 1933 Double Eagle to James G. McAllister for $500. And so began the saga of ten stolen Double Eagles making their way through the hands of thieves, collectors, Kings, and the Secret Service. For over forty years, the United States Treasury Department chased the missing Double Eagles, retrieving nine of them through informants, dealers and litigation.

From the vault of a King to NYC.

In the thirties and forties, King Farouk of Egypt collected things. He collected stamps and erotica and Galle glass, he collected Imperial Faberge Easter Eggs and antique aspirin bottles. He also collected coins. Double Eagle number ten made its way to Cairo on March 11, 1944 in a diplomatic pouch and there it would remain until 1954 when Sotheby's was asked to auction the ousted King's coin collection. The catalogue listed nearly 80,000 coins, 8,500 of which were gold. In lot 185 was a 1933 Double Eagle. The United States Mint found the Double Eagle in the catalogue and requested that it be removed from the sale and returned to the United States. President Naguib of Egypt did order the removal and promised to consider the return of the coin. It was not to be seen nor heard of again for nearly forty years.



On February 7, 1996 an English coin dealer arrived in New York on a British Airways flight from London, in his possession — a 1933 Double Eagle.

A narrow escape.

The Englishman arranged to meet with an American coin dealer at the Waldorf Astoria to negotiate the sale of the coin. To the surprise of both men, they also met with the U.S. Secret Service who had learned of the meeting through wiretaps. Both dealers were arrested and the coin was seized.

During five years of litigation, sworn testimony identified the coin as having been King Farouk's. Ultimately, an out-of-court settlement was reached between the U.S. Government and attorneys for the English coin dealer.

The United States Government will officially monetize and issue this single 1933 Double Eagle, making it the only one of its kind certified for private ownership. It will be accompanied by a Certificate of Transfer engraved by the Bureau of Engraving and Printing, and signed by the Director of the United States Mint and the Associate Director for Numismatics.

One last mystery.

Nearly seventy years after its minting, the most talked-about coin in U.S. history is just days from the end of a most astounding journey. Estimated to bring between $4,000,000 and $6,000,000 on July 30th at Sotheby's headquarters in New York, the Forbidden Fruit of American coins will appear once again, now in the spotlight instead of the shadows as it goes on sale legally for the first time in its remarkable history.

Only one last mystery surrounds the coin the world has longed for... who will finally own it?

This important and once in a life-time sale is brought to the public through a partnership of Stack's, the world's leading dealer of rare and unique coins, and Sotheby's, the world's leader in auctions.

This sale will be featured on eBay Live Auctions. Log in to www.ebayliveauctions.com

Sotheby's / Stack's

Exhibition in New York: July 29-30
AUCTION · July 30
INQUIRIES · David Redden 212 606.7386 or Lawrence Stack 212 582.2580
CATALOGUES · 800 444.3709 or www.sothebys.com and www.stacks.com